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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ARMAND JOSEPH TIANO et al., Defendants and Appellants.	H028956 (Santa Clara County Super. Ct. No. 210710)

A jury convicted defendants Matthew Bradley Kellner and Armand Joseph Tiano of conspiracy to commit grand theft (count 1), grand theft (count 2), two counts of embezzlement by a trustee (counts 3-4), perjury (count 9), four counts of tax evasion (counts 12-15), three counts of violating the Unemployment Insurance Code (UIC) (counts 36-38), and two counts of insurance fraud (counts 45-46) unrelated to the other counts. It also convicted Kellner of 10 additional counts of tax evasion (counts 26-35) and three additional counts of violating the UIC (counts 42-44). It also convicted Tiano of three additional counts of embezzlement by a trustee (counts 6-8), one additional count of perjury (count 10), money laundering (count 11), four additional counts of tax evasion (counts 17-20), and two additional insurance-fraud counts and one additional perjury count unrelated to the other counts (counts 47-49). It also convicted defendant George

Stuart Kellner[1] of perjury (count 9) and five counts of tax evasion (counts 31-35). The trial court sentenced Matthew to 11 years and four months, Tiano to 17 years and eight months, and George to six years and four months. Defendants appeal from the judgments.

Matthew contends that (1) the trial court abused its discretion by denying his pretrial *Marsden*[2] motion, (2) the trial court erred by failing to conduct a *Marsden* hearing during trial, (3) he received ineffective assistance of counsel because trial counsel displayed hostility toward him before the jury, (4) the trial court engaged in judicial misconduct, and (5) the trial court abused its discretion by admitting a television news story in evidence over objection grounded on Evidence Code section 352 (exclusion of evidence if probative value is substantially outweighed by probability that admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusion of issues, or misleading the jury).

George contends that (1) the trial court erred by denying his request to associate retained cocounsel, (2) the trial court engaged in judicial misconduct, (3) no substantial evidence supports his perjury conviction, (4) the trial court erroneously instructed the jury as to the perjury count, (5) the trial court erroneously instructed the jury as to the tax evasion counts, and (6) the trial court erred by refusing to entertain his motion for a new trial.

Tiano contends that (1) the trial court erred by giving the jury argumentative instructions relating to the concept of intent to defraud, (2) the trial court erroneously instructed the jury as to the tax evasion counts, (3) the trial court erred by giving the jury argumentative instructions relating to the concept of willfully committing tax evasion, (4)

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[1] As the parties do, we will sometimes refer to the Kellners by their given names for clarity.

[2] *People v. Marsden* (1970) 2 Cal.3d 118 (right to discharge appointed counsel for inadequate representation and substitute another appointed counsel).

the trial court erroneously instructed the jury as to the UIC counts, (5) the trial court erred by giving the jury argumentative instructions relating to the distinction between employees and independent contractors for purposes of the UIC counts, (6) no substantial evidence supports his perjury convictions, (7) the trial court erroneously instructed the jury as to the perjury counts, and (8) he received improper multiple punishments (Pen. Code, § 654[3] [prohibiting multiple punishments for a single act or course of conduct]).

Defendants also advance that, in the event no one error by itself is sufficient to justify reversal, cumulative error requires reversal. And they have joined each other's arguments. (Cal. Rules of Court, rule 8.200(a)(5) ["a party may join in or adopt by reference all or part of a brief in the same or a related appeal."].)[4]

We affirm the judgments.

[3] Further unspecified statutory references are to the Penal Code.

[4] In addressing defendants' arguments, we have endeavored to arrange the issues in a sequence as likely occurred at trial rather than as raised by the individual defendants. And we may introduce certain arguments as advanced by a particular defendant or defendants though they may apply via joinder to a defendant who does not make a unique argument.

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I. BACKGROUND

In 1979, the Kellners incorporated Stuart Bradley Productions (SBP) in Nevada. Matthew served as SBP's president; George served as SBP's chairman and secretary. SBP engaged in commercial fundraising and publishing, primarily for law enforcement organizations and labor unions. In 1983, it opened an office in Walnut Creek, California and contracted with the Santa Clara County Deputy Sheriffs' Association (DSA), the union that represented deputy sheriffs in Santa Clara County. Tiano was president of DSA.[5] The contract allowed SBP to raise money for DSA by soliciting the general public for charitable donations via telemarketing and selling advertising in an annual crime-prevention and safety publication. For those services, the contract provided that SBP retain 85 percent of the funds raised and pay DSA 15 percent of the funds raised. DSA used its share of the funds raised for officer benevolence, local youth sports, and the like. At some point, the Kellners began diverting DSA's share of the raised money for their own use and paying money secretly to Tiano. Tiano, in turn, used his position to promote SBP to DSA and other law enforcement organizations. In 1989, he admitted to DSA's board that he was being paid by SBP and recused himself from voting on SBP's contracts. Near this time, SBP's accounting to DSA became unreliable and SBP bounced checks to DSA. SBP ultimately amassed a debt to DSA of over $100,000. DSA then asserted monetary control by opening its own bank account for the raised funds, directed SBP to deposit the funds in that account, and agreed to pay SBP from that account.

In October 1992, a television news program broadcast stories critical of the Kellners and SBP's fundraising practices. Two days later, the Kellners formed a Nevada corporation called Family Entertainment Group of California, Inc. (FEG), to continue the

[5] The parties are unclear about Tiano's tenure as president and as a member of DSA's governing board. It appears that Tiano was president of DSA on and off until his retirement in 1996 and a member of the board at all times until 1996.

fundraising business. FEG assumed SBP's debt to DSA and paid DSA $25,000 against the $100,000 debt in exchange for a new fundraising contract, which terminated in 1995 with $67,000 still owing by FEG to DSA.

In 1993, Tiano incorporated business entities with names that sounded as if they were associated with law enforcement organizations and signed contracts with FEG to raise funds on behalf of the entities. Tiano recruited deputy sheriffs to serve on the boards of his entities but there were no meetings or members of the entities. One entity, the Deputy Sheriffs' Athletic League (DSAL), led to a dispute between Tiano and DSA regarding the similarity of DSAL's name to DSA's name. At some point, DSA paid Tiano $7,500 and Tiano changed DSAL's name to the Police and Sheriffs' Athletic League (PSAL).

The telemarketers, employees of FEG, DSAL, and PSAL who were paid in cash, used the names of Tiano's entities to solicit donations from the public. In doing so, the telemarketers misrepresented the entities as legitimate law enforcement organizations and themselves as volunteers for the organizations rather than paid telemarketers. They also misrepresented themselves as authorized, for example under the DSAL or PSAL name, to raise funds for legitimate organizations, such as Ronald McDonald House and Lucile Salter Packard Children's Hospital. The scheme operated from 1994 until 1999 and raised over $3 million. Only $50,000 found its way toward charitable purposes.

The scheme is the basis for the conspiracy, grand theft, and embezzlement convictions. The perjury convictions stemmed from false state regulatory filings signed under penalty of perjury required of commercial fundraisers (FEG) and charitable trusts (PSAL). The money laundering conviction resulted from checks written on the accounts of DSAL and PSAL that were payable to "cash" and endorsed by Tiano. The tax evasion convictions related to failure to file corporate tax returns for PSAL and FEG and failure to report individual income. The UIC convictions stemmed from PSAL, FEG, and Matthew (1) failing to file UIC tax returns, (2) failing to pay payroll taxes, and (3) failing

to pay unemployment insurance taxes. The insurance-fraud convictions arose from Tiano's injuries suffered in an automobile accident after which Tiano settled a claim with an insurance company after lying about suffering lost wages from FEG. Tiano's stand-alone insurance-fraud convictions resulted from a work-place accident after which Tiano received permanent-disability workers' compensation benefits though he thereafter participated in truck-race and bench-press competitions. Tiano's related perjury count stemmed from his lawsuit against the owner of the equipment that caused his work-place injury in which Tiano provided false deposition testimony and interrogatory answers and received settlement money from the owner's insurance company.

II. PRETRIAL *MARSDEN* MOTION

When a defendant seeks to discharge appointed counsel and substitute another attorney, he must establish that his counsel is " ' " 'not providing adequate representation' " ' " or that he or she and counsel " ' " 'have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' " ' " (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.) In ruling on such a motion, the court should not rely solely upon courtroom observations but must consider any " 'specific examples of counsel's inadequate representation that the defendant wishes to enumerate.' " (*People v. Horton* (1995) 11 Cal.4th 1068, 1102.) The ultimate decision whether to grant substitution is a matter of judicial discretion. (*Ibid*.)

"While the concept 'abuse of discretion' is not easily susceptible to precise definition, the appropriate test has been enunciated in terms of whether or not the trial court exceeded ' "the bounds of reason, all of the circumstances before it being considered." ' " (*Troxell v. Troxell* (1965) 237 Cal.App.2d 147, 152.) "A decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citations.] In the absence of a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate

objectives and, accordingly, its discretionary determinations ought not be set aside on review." (*People v. Preyer* (1985) 164 Cal.App.3d 568, 573-574.)

In the *Marsden* context, " 'Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel.' " (*People v. Horton*, *supra*, 11 Cal.4th at p. 1102; see also *People v. Crandell* (1988) 46 Cal.3d 833, 859.)

Disputes over tactics are insufficient to justify relieving counsel. (*People v. Crandell*, *supra*, 46 Cal.3d at pp. 859-860.) Similarly, a defendant's assertions that he does not trust his lawyers or think highly of them are insufficient to justify relieving counsel. (*People v. Memro* (1995) 11 Cal.4th 786, 857 [" ' "[i]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law" ' "]; see also *People v. Silva* (1988) 45 Cal.3d 604, 622 ["the number of times one sees his attorney, and the way in which one relates with his attorney, [do] not sufficiently establish incompetence"].)

On February 26, 2003, nine months before trial, Matthew filed a written *Marsden* motion to remove Michael Hingle. Matthew's supporting declaration declared that (1) Hingle was appointed in September 2002, (2) the case was complicated, complex, and document-intensive involving 35 Grand Jury transcripts, 30,000-40,000 pages of Grand Jury exhibits, and rooms of financial records that had not been cataloged or reviewed by Hingle, (3) in September 2002, Matthew drove from Oakley to San Jose for a meeting with Hingle only to wait several hours and be told that Hingle could not meet with him, (4) in September 2002, Hingle did not respond to Matthew's requests to meet, (5) in October 2002, Matthew met Hingle and learned that Hingle was a one-man defense firm knowing little about the case, (6) in October 2002, Hingle did not return Matthew's

telephone calls or letters requesting a follow-up meeting, (7) in November 2002, Hingle recommended that a tax attorney be appointed but had done nothing in that regard, (8) Matthew had not had a meaningful conversation with Hingle, (9) Matthew possessed half of the Grand Jury transcripts, which Hingle had not yet requested for review, and (10) Matthew had no confidence in Hingle's ability to handle the case.

At the hearing, Matthew added that he and Hingle had no communication or attorney-client relationship. He asserted: "And then from December until our court date of last week, last Wednesday, I've not been able to have a conversation with him or set up a meeting with him or anything, even though I've tried numerous times to do it. [¶] And I've got to have somebody represent me that will work with me. And there is so much discovery that we need to go through and there is [*sic*] so many laws that need to be researched and there is [*sic*] so many filings of different motions that need to happen that it's going to just take a real partnership between an attorney and his client in order to make that happen. And that's not what's happening in this case, sir." Hingle replied that he had already met four times with the appointed defense attorneys, shared resources, created a joint database to search the Grand Jury transcripts, and provided Matthew with a summary and samples of a search. He conceded that he had stopped reviewing the People's evidence that had been recorded on two CDs because the prosecutor had told him that a third CD would be forthcoming that would replace the first two CDs. He offered that (1) his work method was to review all of the evidence objectively before hearing his client's spin, (2) the conflicts administrator had promised to appoint a tax expert if the case did not resolve at a future settlement conference, (3) he shredded Matthew's letters to him because the letters indicated that Matthew had sent copies to his prior retained attorney (which suggested that Matthew had no financial need for appointed counsel), (4) he had no need for the Grand Jury transcripts in Matthew's possession until he finished reviewing the transcripts already in his possession, and (5) he was paring down his practice for this case, trying to get the case to a settlement

conference, and assuming that trial would begin in July 2003. Matthew opined that there was no way Hingle could be ready for motions or trial and asserted that he had not seen billings to substantiate Hingle's work product. At the trial court's request, the parties stipulated that the trial court could converse with the conflicts administrator. The trial court then continued the hearing. At the continued hearing, the conflicts administrator was present and the subject centered upon Matthew's qualification for appointed counsel. The trial court ordered Matthew to provide the administrator with financial information and continued the hearing. At the continued hearing, the trial court left Matthew's appointment of counsel intact. Matthew then argued that his bottom line was that he had tried to communicate with Hingle but was thwarted by and lost trust in Hingle; he reiterated that the case required a tremendous amount of work requiring someone who will respond, meet, and plan a good defense; and he again opined that Hingle was providing inadequate representation and irreconcilable differences existed. The trial court found no breakdown in the attorney-client relationship or issue of incompetence and denied the *Marsden* motion.

Matthew contends that the trial court abused its discretion because "The written and oral record before [the trial court] amply demonstrated that the relationship between Mr. Hingle and [him] was highly problematic and that the two were unlikely to develop the kind of working partnership necessary in order for [him] to have effective representation in this very complex case."

Matthew manifestly fails to carry his burden to demonstrate an abuse of discretion.

It is not the question here whether the facts relied on by Matthew show that the relationship between Matthew and Hingle was highly problematic and unlikely to result in effective representation. It is whether the trial court's contrary view was justified. Clearly it is.

First, accepting Matthew's characterization of his showing, the trial court could have rationally concluded that showing a highly problematic relationship unlikely to

result in effective representation falls short of showing a relationship that would substantially impair the right to assistance of counsel. And second, the trial court heard Matthew's specific complaints. The complaints amounted to a lack of trust stemming from Hingle's supposed unavailability and inability or unreadiness to try the case. But Hingle rebutted the complaints. From this, the trial court was entitled to conclude that Matthew's lack of trust was unjustified or, at most, amounted to a disagreement over Hingle's tactics.

In short, the evidence supports a conclusion that a failure to replace Hingle would not substantially impair Matthew's right to assistance of counsel. That other evidence arguably supports a contrary conclusion is insufficient to demonstrate an abuse of discretion.

III. MOTION TO ASSOCIATE RETAINED COCOUNSEL

George is an attorney. In the early pretrial stages of the case he represented himself. Later, he moved to associate John Coker as retained cocounsel. The trial court granted the motion subject to the ultimate trial judge's determination whether cocounsel status would continue at trial. Once assigned to a trial department, George filed a motion to associate cocounsel for trial. The motion pointed out the complexity of the case and that the People and Tiano had cocounsel representation. The trial court denied the motion, and George elected to be represented by Coker. George contends that the trial court committed structural error by denying his right to retained counsel of his choice. There is no merit to this claim.

"It is settled that a criminal defendant does not have a right both to be represented by counsel and to participate in the presentation of his own case. Indeed, such an arrangement is generally undesirable." (*People v. Clark* (1992) 3 Cal.4th 41, 97.)

" 'As long as a defendant is represented by counsel at trial, he has no absolute right to participate personally in his own defense. [Citation.] While the Sixth Amendment guarantees both the right to self-representation and the right to counsel, a

defendant who elects representation by counsel does not have a constitutionally protected right to appear as cocounsel. [Citations.] The court may exercise its discretion and permit a defendant to actively participate in the presentation of his case. But it grants that request on a substantial showing [that] the cause of justice would be served and the "orderly and expeditious conduct of the court's business" would not be substantially hindered. [Citation.]' [Citation.] 'The burden is on the defendant to make the requisite showing. A trial court is not required to inquire further into the matter where the defendant has not first offered the "substantial showing." [Citations.]' [Citation.] 'Where . . . a defendant fails to show cocounsel status would serve the interests of justice and would not result in substantial disruption, there is no basis for the exercise of the court's discretion, and the motion is properly denied.' " (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1310-1311 (*Crabtree*).)

In *Crabtree*, the defendant was a licensed attorney and sought cocounsel status for himself because there were " 'numerous boxes of an internal affairs investigation that was just overwhelming [and he had] done the preparation of that part.' " (*Crabtree*, *supra*, 169 Cal.App.4th at p. 1310.) The trial court denied the defendant's request by explaining that the defendant would be present with and able to assist counsel at trial. On appeal, the court rejected the defendant's claim of error. After citing the above legal principles, it concluded that the defendant had not demonstrated an abuse of discretion. It suggested that the defendant needed to at least show that "his cocounsel status was necessary to compensate for some inadequacy of his attorney or how such status would have enhanced his defense." (*Id.* at p. 1311.)

Thus, the question before us is whether the trial court abused its discretion by denying George's motion. But George makes no argument along these lines. He asserts that he had a right to represent himself and retain cocounsel, the denial of which gives rise to structural error requiring reversal. He disagrees with the general principles of law cited in *Crabtree* but cites no authority for his proposition. Moreover, he concedes that

he "has not found a case on point." As for *Crabtree*, which is on point, he asserts that the case is inapposite because, there, the defendant sought cocounsel status for himself while, here, he sought cocounsel status for another. But this is a distinction without a difference. He also distinguishes *Crabtree* because it is unclear from that case whether the defendant's attorney was retained or appointed--another distinction without a difference. To the extent that George assumes that the question below was discretionary, he does no more than reargue by pointing out the case's complexity and the existence of other cocounsel in the case. Most notably, he fails to explain why it was irrational for the trial court to implicitly conclude that he had failed to carry his burden to make the required substantial showing that the cause of justice would be served by granting cocounsel status. And we observe that, like the defendant in *Crabtree*, George was fully able to assist Coker, did not identify any inadequacy of Coker, and did not explain how cocounsel status would enhance his defense over and above how his assistance would enhance his defense. We are aware of no case, federal or state, that has held a denial of hybrid representation to be an abuse of discretion or a denial of assured rights, and George has directed us to none.

IV. TRIAL *MARSDEN* MOTION

Just before the People rested, Matthew orally raised a second *Marsden* motion. He told the trial court that Hingle was planning to rest without putting on a defense but he wanted 20 witnesses and himself to testify. The trial court summarized as follows: "So what I'm hearing you say is you want 20 witnesses to testify and you believe Mr. Hingle believes it's better to rest rather than put on those witnesses. I heard you say that you want to testify and you believe that Mr. Hingle believes that it is better that you do not testify. I heard you say that you want to defend yourself because these are serious charges. [¶] I heard you say that there is a conflict between yourself and Mr. Hingle that has gotten progressively worse. You indicated that there was anger between the two of you and some of it was based on him cutting you off and not listening to you and you

believe that the People have not proven their case." Matthew clarified that he believed that the People had not proven their case as long as he was allowed to put on his case with his witnesses. When the trial court asked whether he wanted Hingle removed, Matthew replied, "Well, if he doesn't put on my case I want him removed. If he puts on my case I want him to stay." The trial court added that its job was to rule on whether Matthew had met his burden to have Hingle removed as his attorney. Matthew then told the trial court that he had talked to and agreed with a codefendant's counsel about calling an out-of-town witness who was a teacher to testify out of order that afternoon about his dyslexia, writing abilities, and math.

Hingle then stated that his recommendation was to rest without putting on a defense and then to argue reasonable doubt to the jury. He added that he had advised Matthew of his right to testify. He opined that he objected to calling the teacher as a witness because the teacher did not qualify as an expert and the evidence that Matthew expected from her was irrelevant, back-door character evidence. He speculated that his relationship with Matthew was difficult because Matthew seemed to heed the trial tactics of his codefendants in the mistaken belief that his interests coincided with theirs.

The trial court continued as follows: "[Hingle's] point is he calls the shots in his own words regarding which witnesses are called if at all, however you do have a right to testify on your own behalf and his representation of you believes he cannot prevent you from so testifying and so I just want to take this step by step. [¶] I am trying to find out [*sic*] is the communication between you and him to the point where it's absolutely broken down and you cannot communicate with him or there is still ongoing dialog. You disagree and you are not happy with his advice to you." Matthew replied: "It seems to be broken down. There has not been an understanding between us and I am not trying, believe me, when [Hingle] is working we're working together. I like him, but at this point we have this big division and it's got--we have to be able to communicate and be nice to each other and that hasn't been happening." The trial court then clarified: "Let

me tell you how this works. You don't have to be nice to him. He doesn't have to be nice to you. It doesn't have to be pleasant conversation, but he has to be able to work with you and give you advice and you have to have a dialogu[e]. If you tell me that it's so broken down that you cannot have an attorney represent you because you cannot communicate with him that means he will be removed and you will go forward representing yourself which is a very serious step." Matthew replied, "Well, I don't want to represent myself, your Honor. Could I get a replacement attorney?" To this, the trial court answered: "No. You could not get a replacement attorney. The reason why, this trial takes about two years of representation time. There is also in limine motions which took four months. The jury has been with us for six months. There is probably another two months to go in this trial, so to bring in a fresh attorney that attorney would then ask for a continuance. That continuance would have to be--they would request two and a half years if I could give it within the realm of a six month continuance so that attorney would get up to speed. We would lose all of our jurors and then we would have a mistrial and start again, so it's not practical or reasonable or viable to bring in a new attorney at this stage. So really your choices are to have Mr. Hingle or go it alone, for lack of a better term. And I can't tell you what to do. I don't know what's best for you, that's only for you to decide, but if you tell me that the lack of having an attorney would have such an impact on you that you would be motivated to work with him and take his advice then we can continue with Mr. Hingle. If you tell me it's so broken down and you can't talk to him the only alternative is we go forward and you represent yourself." Matthew then concluded: "I like Mr. Hingle personally a great deal. We've got a warmth for each other. He's a little unusual sometimes, but I believe he does have a lot of my best interest at heart. As you suggested I just want to be able to put on my case and I am entitled to do that at this stage." To this, the trial court ruled as follows: "That is your decision. What I find you have not laid the grounds for a *Marsden* motion. I will not grant your motion. You have the right to fire Mr. Hingle and represent yourself so if you get to that point

that's your decision, but I cannot give you a replacement counsel. And if you think there is grounds for relieving Mr. Hingle in the future you can bring another *Marsden*, but you know the parameters that I've explained to you."

Matthew contends as follows: "[T]he trial court erroneously told him . . . that if the motion to discharge Mr. Hingle were granted, the court would not appoint a replacement attorney, and Matthew would have to go forward representing himself. At that point, Matthew abandoned his effort to have Mr. Hingle discharged. The trial court thus deprived Matthew of a fair opportunity to make his case for replacement of Mr. Hingle."

"Generally, a trial court's refusal to listen to a defendant's reasons for requesting a substitution of counsel does not comport with the standards set forth in *Marsden.* We therefore emphasized the need to permit the defendant to enumerate specific instances of inadequate representation, in order to permit a proper exercise of discretion [citation], as well as to afford appellate review [citation]. [¶] However, 'the right to the discharge or substitution of court-appointed counsel is not absolute, and is a matter of judicial discretion unless there is a sufficient showing that the defendant's right to the assistance of counsel would be substantially impaired if his request was denied.' " (*People v. Clark*, *supra*, 3 Cal.4th at p. 104.)

Here, we are able to afford adequate appellate review because Matthew repeatedly made his point crystal clear: Matthew was dissatisfied with Hingle because Hingle intended to rest without putting on witnesses. Again, disputes over tactics are insufficient to justify relieving counsel. (*People v. Crandell*, *supra*, 46 Cal.3d at pp. 859-860.) The decision to call witnesses is a matter of trial strategy and tactics. (*People v. Robles* (1970) 2 Cal.3d 205, 215.) Generally, counsel's decision to call particular witnesses is "precisely the type of choice which should not be subject to review by an appellate court." (*People v. Floyd* (1970) 1 Cal.3d 694, 709, overruled on another ground in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.) Moreover, a disagreement with

counsel's no-defense decision is also one about tactics in the absence of showing what meritorious defense counsel was failing to offer. (*People v. Rodriguez* (1977) 73 Cal.App.3d 1023, 1030-1031.) Stated another way, the trial court could have reasonably concluded as follows: "[A]ny conflict between [Matthew] and [Hingle] was manufactured by [Matthew] himself. [Matthew] refused to accept that there were any matters within the province for [Hingle] to decide. He desired to control all trial decisions and to make [Hingle] subservient to his whims. He has not shown the impairment of the right to effective assistance of counsel or that any lack of communication was the fault of anyone but himself. As noted before, there is no guarantee of a meaningful relationship between an accused and his counsel." (*People v. Clark*, *supra*, 3 Cal.4th at p. 118.) Thus, Matthew again fails to demonstrate an abuse of discretion.

Moreover, we disagree with Matthew's point that he abandoned an effort to fully state his reasons when the trial court gave him a choice of Hingle or self-representation. The trial court listened to Matthew's reasons at the outset of the hearing. It summarized Matthew's complaint. It quizzed Matthew about his complaint, and Matthew affirmed that all was well "As long as [he was] allowed to put on [his] case." It continued to quiz Matthew, and Matthew described an attorney-client relationship that was functional "[i]f he puts on my case" and dysfunctional "if he doesn't put on my case." It further quizzed Matthew, and Matthew affirmed that he could communicate with Hingle if they "put on a case and call witnesses." It persisted in quizzing Matthew about his communication with Hingle, and Matthew stated that the communication seemed to be broken down because of the big division over strategy. In short, Matthew left nothing unsaid--he fully stated his grievance and it did not provide a basis for a meritorious *Marsden* motion. The trial court expressly found as much. In this context, the trial court's remarks about choosing Hingle or self-representation can be construed as offering Matthew his options given his failure to establish a right to *Marsden* relief. The trial court's ruling stated as much. But,

even if Matthew was convinced to end his presentation by construing the trial court's remarks as a Hobson's choice, the prior dialogue demonstrates that Matthew had nothing more to present.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) That right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*Ibid.*) But "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 8.)

"To establish constitutionally inadequate representation, a defendant must demonstrate that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.) 'When a defendant on appeal makes a claim that his counsel was ineffective, the appellate court must consider whether the record contains any explanation for the challenged aspects of representation provided by counsel. "If the record sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' [citation], the contention must be rejected." ' " (*People v. Samayoa* (1997) 15 Cal.4th 795, 845.)

Defendant bears a burden that is difficult to carry on direct appeal. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) Our review is highly deferential; we must make every effort to avoid the distorting effects of hindsight and to evaluate the challenged

conduct from counsel's perspective at the time. (*In re Jones* (1996) 13 Cal.4th 552, 561; *Strickland v. Washington*, *supra*, 466 U.S. at p. 689.) In evaluating whether trial counsel's representation was deficient "we accord great deference to the tactical decisions of trial counsel in order to avoid 'second-guessing counsel's tactics and chilling vigorous advocacy by tempting counsel "to defend himself [or herself] against a claim of ineffective assistance after trial rather than to defend his [or her] client against criminal charges at trial." ' " (*In re Fields* (1990) 51 Cal.3d 1063, 1069.) A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. (*Strickland v. Washington*, *supra*, at p. 689; *People v. Hart* (1999) 20 Cal.4th 546.) The burden is to establish the claim not as a matter of speculation but as a matter of demonstrable reality. (*People v. Garrison* (1966) 246 Cal.App.2d 343, 356.)

Matthew contends that Hingle was constitutionally ineffective because Hingle displayed hostility toward him during his testimony. The supposed hostility arises from an extensive background, some of which was touched upon in Matthew's *Marsden* motions and the rest of which follows.

Against Hingle's advice, Matthew exercised his right to testify, spending nine days on the witness stand. During the prosecutor's cross-examination at a conference outside the presence of the jury, the trial court was constrained to remark that Matthew was "perhaps the most nonresponsive witness" it had ever seen. It admonished Hingle and Hingle agreed "to take a few minutes to explain when there is a question he can answer the question if he wants to explain it, but he doesn't start his answer with just whatever he wants to talk about because it has nothing to do with the question." Afterward, the trial court told Matthew that "if you are nonresponsive, I will tell the jury that you are not responsive. . . . I have warned you numerous times both outside the presence of the jury, inside the presence of the jury to stop doing it. You are purposefully disregarding court orders. If you want me to say that in front of the jury, I will do so, that

is your choice." Matthew persisted in giving nonresponsive answers, which caused the trial court to remark at another conference outside the presence of the jury as follows: "But there are certain ramifications to the answers you are giving and it has been abundantly clear that you, by me and Mr. Hingle, but you choose to add things into the answers that are problematic for your attorney and you don't seem to be concerned about that. [¶] I want to make sure that you fully understood that when you go off into your tangents, you are opening the door to many areas that would allow all of the attorneys in this room to explore. [¶] And before we go further down this path I wanted to make sure you understood that was what is occurring and that you are okay with that because my sense is that you are in alignment with Mr. Coker and your brother George Kellner in this regard and it is against your attorney's advice and I want to make sure you are making an option in this area so that Mr. Michael Hingle is not accused of ineffective assistance of counsel at some later time." Hingle added the following: "Your Honor, this is exactly what I feared and I want to state at this time it is my belief that Mr. Coker is intentionally opening these doors so that my client can be put up as the scapegoat and fall guy while [George] appears to be not involved in any of these things. This is what I feared from the start this morning when I made my initial objection of the scope and I think it's coming true." To this the trial court replied that "it is clear to the court that [Matthew], who is testifying, is going along willingly and he may pretend to not know what is going on, it's a very clear and methodical process by which he is giving his testimony under Mr. Coker's examination which is almost polar opposite with the way he gave testimony under cross-examination of the People . . . . [¶] . . . [¶] . . . [B]ut the reason we are taking this break is because I don't want to make these comments on the evidence in front of the jury, but to just give my comments to the attorneys and [Matthew] so [Matthew] fully understand[s] where we go from here. [¶] I think as a judge I have an obligation to bring this up with [Matthew], because if he is going against the advice of his attorney, he is inviting error at this point, it is not ineffective assistance of counsel." Later and again

outside the jury's presence, Hingle sought a mistrial and the disqualification of Coker to which the trial court remarked as follows: "Let's bring all of this to focus. Let's assume that [Matthew] whose working behind your back even last week is not the grounds for a mistrial, and really not the grounds to have Mr. Coker excused from the case. [Matthew] goes forward and does what he wants to do for some time, it's fairly obvious. And I knew you are [*sic*] upset about it, but don't take it personally, that's his choice and so it doesn't mean the evidence is inadmissible, it just gives you some options whether you are going to examine your client."

During redirect examination after Matthew gave a nonresponsive answer, Hingle responded by asking a leading question, Coker objected to Hingle's question as leading, and the trial court granted Hingle's request to treat Matthew as a hostile witness who would be subject to leading questions. Hingle then proceeded to ask Matthew a series of questions, Matthew gave nonresponsive answers, and Hingle admonished that the answers were nonresponsive and asked for "yes" or "no" answers. After one nonresponsive answer, Hingle asked, "[Matthew], look at me please, not over there. I am the one trying to defend you here." After another such answer, Hingle generated objections by asking, "is there a reason why you seem to be responsive to the questions of Mr. Siino [Horace Siino represented Matthew's mother] and [Coker], but you won't even respond to my questions, your own lawyer?" The trial court overruled the objections after Hingle affirmed that there were strategic reasons for the question. After hearing the question twice more, Matthew replied, "No. I want to answer your questions." Hingle concluded his examination with the question, "Isn't it true, [Matthew], that you have been pushed up here like a prop by your mother and your brother, just like you were pushed out to sell snow cones at the age of 12?" The trial court sustained an objection to the question on the grounds that it was argumentative.

The next day at another hearing outside the jury's presence, Hingle offered the following: "I will state for the record that I made a tactical decision to ask the questions

that I asked yesterday, that I asked those questions intentionally. [¶] . . . [¶] The basis for me asking the questions that I asked yesterday specific as to whether or not there was a reason that Matthew . . . testified non-responsively to myself, non-responsively for the prosecution, but in my mind appeared to testify responsively to Mr. Coker and Mr. Siino's questions was based on simply of what I saw." He reiterated his belief that Matthew was following advice from Coker and Siino that was adverse to his interests. The trial court added that Siino had been historically disrespectful of the court more than once despite being warned, a warning that included one against calling Hingle unethical after Hingle had affirmed having a reason "for doing what he was doing." It concluded as follows: "I think it was apparent to everybody in the courtroom, including the jurors, that you [Siino] were being outrageous. It could be argued that Mr. Hingle was being outrageous, but Mr. Hingle has something which allows him to be outrageous which is his defense of his client which I find to be paramount and overriding than these concerns. And I did a [Evidence Code section] 352 analysis and determined that although it is an unusual tactic to take on your own client as an adverse witness and try to secure from him some testimony that would be helpful to him, which is Mr. Hingle's theory of the case that he was being used as a tool by his brother and mother in this trial, that is not a wholly unbelievable or unreasonable tactic for Mr. Hingle to take. But I believe he had good cause for taking his position. I'm sure we'd all disagree on whether we would do that, but I believe Mr. Hingle had good cause, which is all that is required, and he indicated that he had tactical reasons and he has put those tactical reasons on the record that that is sufficient."

Matthew argues "that he was denied the effective assistance of counsel when, during [his] testimony and in front of the entire jury, Mr. Hingle asked the court to declare Matthew a 'hostile witness' and thereafter proceeded to question [him] as if [he] was being evasive and untruthful in his testimony. This shredded Matthew's credibility and demonstrated to every person in the courtroom that Matthew and Mr. Hingle were

not part of the same team." He tacitly concedes that Hingle had tactical reasons for the procedure but urges, without citation of authority, that the tactics were unreasonable because it allowed the jury to believe that he was testifying untruthfully. There is no merit to this claim.

Matthew testified nonresponsively when questioned by his own attorney and the prosecutor and responsively when questioned by his codefendants' attorneys. His nonresponsive answers were problematic for his defense and his responsive answers suggested a problematic alignment with his codefendants. This was not only apparent to Hingle but also apparent to the trial court. Hingle made a tactical decision to diffuse Matthew's problematic testimony by seeking to ask leading questions. Whether the tactic worked or backfired is not the question. The salient point is that the trial court not only permitted the tactic but also specifically agreed that the tactic, though unusual, was necessary and reasonable. Matthew simply disagrees on a matter where reasonable minds can differ. We repeat that we accord great deference to the tactical decisions of trial counsel in order to avoid second-guessing counsel's tactics and chilling vigorous advocacy by tempting counsel to defend himself against a claim of ineffective assistance of counsel after trial rather than to defend his client against criminal charges at trial. And we agree with the trial court's implicit belief that this issue has been manufactured by Matthew himself out of his refusal to accept that there were any matters within Hingle's province to decide and desire to control all trial decisions, making Hingle subservient to his whims.

VI. JUDICIAL MISCONDUCT

George and Matthew contend that the trial court engaged in what we glean are 16 instances of judicial misconduct that interfered with their right to a fair and impartial trial. "Although no objection was raised to several of the incidents now cited as misconduct, the People do not take the position that defendant has forfeited [the] judicial misconduct claims premised on these events. As a general rule, judicial misconduct

claims are not preserved for appellate review if no objections were made on those grounds at trial." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237.)

The first incident complained about occurred when Coker was cross-examining Santa Clara County Sheriff Laurie Smith. Coker asked the following questions of Smith to which the trial court sustained the People's relevancy objections:

"And [your deputies] are employed by you and you pay the salary, that's correct?"

"The employees of your department, the deputies, are they free to form an association, have a bargaining unit to bargain with you?"

"The fact that a member of, an employee of yours, deputy sheriff of this county sits on a board of another organization, boy scouts, cub scouts, whatever, does that make that association affiliated with the sheriff's office?"

"The sheriff's deputies are free to participate in charitable activities as long as it doesn't interfere with their employment, correct?"

"How about the Santa Clara County Deputy Sheriffs' Association, is that affiliated with the sheriff's office?"

"How about the Santa Clara County Deputy Sheriffs' Political Action Committee?"

"How about the Santa Clara County Sheriff's Advisory Board?"

"Sheriff, you became concerned because organizations with the name deputy sheriff in their name were doing fundraising because they are not associated with the sheriff's office, did you become aware that the Deputy Sheriff's Association is soliciting funds through TBS?"

"Would solicitations by the Santa Clara County Deputy Sheriffs' Association through fundraiser TBS, would that cause you concern?"[6]

[6] The People's objection to this question was, "Objection to the line of questioning."

"And you had your own fundraising going from the sheriff's office, too, correct?"

"Was the fundraising by the Deputy Sheriffs' Association, fundraising by the DSAL also in competition with fundraising through your office?"

At this juncture the following colloquy took place.

"[The prosecutor]: Objection; relevance as to the line of questioning.

"THE COURT: Sustained. Do you have anything relevant, Mr. Coker?

"Mr. Coker: Your Honor, that would relate to--

"THE COURT: I am not asking for a response. I am asking do you have anything relevant. We have been over this ground plenty. I need a yes or no to know whether to go to another person or another area.

"Mr. Coker: Your Honor, if you are going to shut me down--

"THE COURT: I am not shutting you down. You are going into areas that I ruled are irrelevant because this jury does not have to know about every fundraising activity in this county or this state. It's not relevant for the issue before them. [¶] So if you want to ask those questions do it out in the hallway. This jury has to decide important things and this isn't one of them.

"Mr. Coker: The issue of attitude of the witness towards one organization, the fact they are in competition, could relate to bias.

"THE COURT: Okay. Under Evidence Code [section] 765 you are finished."

George complains that the trial court "berated Mr. Coker in the presence of the jury." There is no merit to this point.

"[I]t is 'the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.' " (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1237.)

Here, Coker persisted in following a line of questioning that the trial court had repeatedly ruled irrelevant. The trial court offered Coker the opportunity to proffer

another line of questioning, but Coker declined. The trial court therefore properly terminated Coker's questioning. There was no berating.

The second incident complained about occurred when Tiano's attorney, Peter Furst, was cross-examining a retired sheriff's lieutenant and asked, "Did you have any impression that it was to keep track of the monies that were given to you?" After the trial court sustained the People's objection on the ground that the question called for speculation, Furst asked, "Did he say anything to you that would give you the impression that he needed that in order to keep track of the monies that were going out?" After the trial court sustained the People's objection on the ground that the question called for hearsay, Furst argued to the trial court, "This is the same defendant whose statements have been let in because they're admissions." To this, the trial court remarked, "Well, perhaps you don't know the Evidence Code."

George objects to the trial court's remark but does not explain why the remark rises to the level of judicial misconduct that endangered his right to a fair and impartial trial. Furst asked plainly improper questions and argued with the trial court instead of obeying a ruling. Though the trial court could have expressed itself differently, Furst did display ignorance of the Evidence Code given that he equated a self-serving party statement with the party-admission exception to the hearsay rule, which requires that the statement be offered against the party. (Evid. Code, § 1220.) And Furst also displayed ignorance of his duty to promptly comply with a court order.

The third incident complained about occurred when the trial court held a hearing outside the presence of the jury to primarily address Siino's behavior. The trial court began as follows: "Okay. If you start objecting with speaking objections, I am going to take you to task in front of the jury. So I'm warning you now. You know what my guidelines are. We've been over this many times. [¶] Some of you, for whatever reason, are ignoring me, and you just do what you want. If you want to do what you want, that's fine. But from now on out, it's going to be in front of the jury. And you will be scolded,

and it's going to start affecting your clients. So think twice before you make a speaking objection. I don't want to hear anything else on that." At this point, Siino accused the trial court of being unfair and the trial court continued the dialogue as follows: "Mr. Siino, first of all, your presentation, your tone, and the volume of your speech, as well as you speaking over the Court, not allowing me to be heard, is rude, unprofessional, and insulting. [¶] Secondly, when you say that the Court is being unfair three times, that is impugning the integrity of the Court. I've warned you once before about that. If you'd like to go to the State Bar and explain yourself, that can be arranged. And I'm not beyond doing that. I'm not going to do it during the trial, but at the end of the trial, you'll be going to the State Bar to explain why you were impugning the integrity of the Court. It is absolutely outside of your job as an advocate for your client to say, in front of defendants, that I'm being unfair. And we'll take this up at the end of the trial." At this point, Siino interrupted and twice accused the trial court of being "rude and insulting." The trial court continued: "Mr. Siino, I will let you say whatever you want to say, and I will give you a full opportunity to, but you have to allow me a chance to say what I have to say. And I think it's disrespectful for you to talk on top of me and to try to yell on top of me so that I cannot be heard. [¶] I have never seen anything quite like this. And I'm shocked. But I ask you to please wait until I finish saying what I have to say, because I have a list of things and examples of how we can approach these issues, but you never let me get to them. So please wait till I'm done, and then I'll let you say whatever you want to say." It then detailed the following: "You've noticed that other attorneys, when they have something they'd like to say, they say, 'Can we approach?' And if it's something that I know you have something to say and you don't want to say it in front of the jury, you approach. [¶] You, for whatever reason, just like to air all of your issues in front of the jury, including information that you know is not supposed to be in front of a jury, as well as it is in violation of my in limine ruling that there be no speaking objections. I don't know if you have an inability to follow that or you are purposely not following that

or that is your personality or your characteristic. I don't know. But I'm not going to have it. [¶] So if you can say, 'Objection' and the name of the objection, I'm happy to hear your objection. If you want to be heard at sidebar, you say, 'May we approach?' This isn't a big mystery. So that is what I suggest you do in the future. [¶] I would also point out that most of the things that you're saying to me are not in the nature of objections. They're more in the area of argument to the jury. I don't know what else to tell you other than look around the room and look at the other attorneys. And they seem to be able to do it, and you don't. [¶] So please try to keep within the guidelines. Try not to create problems for everybody by saying things in front of the jury that you know should not be said in front of the jury." When the trial court had finished, Siino accused the trial court of making "rulings which I think are wrong" and maintaining "an unfair courtroom" with "rules that I think are unfair." He then admitted to having "a personality that I get angry," being "angry in this courtroom because I do think it's unfair," and being unable to "be so formal in our objections" because he could not "think that quick." The trial court ended the discussion by explaining the following: "But everybody else in this room has no problem sticking to the rule of 'Objection,' and then stating the basis for the objection. You're the one person who can't do it. So don't say it's a set of rules that I put in place that cannot be met. [¶] When I was a lawyer, I lived by those rules. When I was a judge, I had--I've always had people live by those rules. I've never seen anything quite so severe as you. So don't say it's an unattainable goal." At a later hearing outside the jury's presence the trial court added the following: "Specifically, on or about February 23rd of 2004, Mr. Siino was specifically ordered not to say that the Court was being unfair and not to say that the Court was being unfair in front of his client. The Court also advised Mr. Siino that if he did so, it would be considered contempt of Court; that he was warned that this would be contempt of Court if he did so; and that it would possibly result in a referral to the State Bar of California for disciplinary proceedings. [¶] Today, which is May 19th, Mr. Siino repeated that the Court was being unfair and being

unfair to his client. The Court warned Mr. Siino, or advised him, that making such statements was a violation of the Court order, as well as impugning the integrity of the Court. [¶] Despite the Court telling Mr. Siino this, Mr. Siino repeated twice, and possibly three times, after the Court's friendly warning, that he felt that the Court was being unfair to the defense and being unfair to his client. [¶] Mr. Siino's volume while he was talking to me, on a scale of one to ten, was an 11. He yelled me down three times, meaning when the Court started to speak, Mr. Siino would speak on top of the Court as loud as Mr. Siino could shout in an attempt to stop the Court from speaking. [¶] When the Court spoke to Mr. Siino, Mr. Siino would turn his back on the Court and fold his arms, which is also a demonstration of contempt. [¶] Mr. Siino was given an opportunity to apologize to the Court, and he did not apologize."

Again, George fails to explain how the Siino incident constitutes judicial misconduct that endangered his right to a fair and impartial trial. Siino behaved unprofessionally. The trial court did no more than try to change that behavior. And it did so outside the jury's presence. The incident illustrates attorney misconduct rather than judicial misconduct.

The fourth incident complained about occurred when Hingle began cross-examining a hostile witness and the trial court almost immediately admonished the attorneys against making snide comments to the witness and the witness against making snide comments to the attorneys. After another exchange that provoked the witness to twice tell Hingle, "Don't get intimidating with me," and Hingle to reply, "Oh, I am going to get in your face," the trial court told Hingle "don't shout and yell at this witness. Do not get out of your chair and lunge towards him. Do not create . . . a security issue . . . . [¶] . . . [¶] The record will reflect that you were heading down the aisle as if to be aggressive towards this witness. And I do not want that in my courtroom. You made both the deputies get up. We don't need that. So just keep near your seat. I don't want you to go near any witness. [¶] And as for the witness, do not argue with the attorney."

After further cross-examination and at a hearing outside the presence of the jury, Hingle announced that "there's a question as to whether or not the witness said something to your deputy . . . regarding me." He continued that, if the witness had threatened him and if the deputy had heard him, "then there's a question of whether or not that can be used against this witness for impeachment." He professed not to know what, if anything, was heard by the deputy but urged that "it needs to be explored now in case the jurors also heard it." The trial court replied as follows: "Okay. First, I'm denying your request under [Evidence Code section] 352 and also under common sense. It would be an undue consumption of court time to find out what was said, if anything. I did not hear anything. Frankly, it was hard to hear anything at that point, Mr. Hingle, because you were screaming so loud. If the jurors heard anything, then they can use it for whatever purpose they use for their own determination of the demeanor of the witness while testifying. [¶] I also find that it would be irrelevant for purposes of impeachment. I would point out that this is not a barroom. This is a courtroom. And an attorney cannot incite a fight in a courtroom and then use the witness' response to the fight as evidence of impeachment. [¶] So the record is clear, this was not a cross-examination and this was not a disagreement. This was not an argument. This was not a fight. This was practically a melee, although no blows were thrown and the witness and the attorney never got within ten feet of each other. However, I believe in the chronicles of courtroom fights, this is near the top. [¶] When you were talking to the witness, it was clear that your point was not to cross-examine him but to put him into a fight. You started out with a snide comment, with a sneer on your face, about you representing Mr. Matthew Kellner, knowing that this witness did not like Mr. Matthew Kellner; and you did so while smiling at him, as if to invite a response from this witness that had nothing to do with this trial. [¶] Secondly, you argued with him in a way that was not cross-examination, but rather you were screaming at him. You were pointing at him. Your face turned bright red, and spit was coming from your mouth as you were screaming at him. At one point, when you

demanded that he give a yes or no response, you were making your way down the aisle as if to have a fight with him. And I won't say fighting words were being used, but you did say, 'Oh, yes, I will get in your face.' [¶] And you started to maneuver your way, in bolt-like fashion, past the attorneys in an attempt to get towards the witness. This caused both deputies, one who was seated in the back of the courtroom and one who was seated at the deputy station, to get out of their chairs and to make sure that you did not get to that witness and perhaps to make sure the witness did not get to you. [¶] So for you now to ask that that be used for impeachment is incredulous. I will never allow somebody who incites a fight in my courtroom to use that for purposes towards their end when you are the one who created that situation." Hingle objected to the trial court's "characterization," and explained that he "did bolt up" but his "point was [he] was not going to be intimidated by a witness" and he "did try to shout over him in the hope that the jury would not hear what he was saying." To this the trial court added: "Well, frankly, I'm shocked you're not embarrassed by your conduct, and I'm shocked that you are trying to rationalize it. That is not what attorneys do. Attorneys do not start fights in courtrooms. Attorneys do not lunge at witnesses in the manner that you did. It's beyond description, really. [¶] But I'm not going to allow it again. Please do not do that again. If you do, I will have to confine you to your chair, because I'm not going to have a fight in my courtroom between an attorney and a witness. It's absolutely ridiculous." The next day, the trial court interrupted Hingle's recross-examination of the witness:

"THE COURT: Listen, this is my time to talk. You are egging on this witness. You are doing it purposefully. You are the one that brings up the issue about I have a lot of time. You are engaging him on a level that is not professional, so don't expect me to reward you for this bad behavior. You need to ask him questions that are questions. [¶] You, sir, do not need to get into it with him.

"THE WITNESS: I am just starting, sir.

"THE COURT: Well--

"THE WITNESS: I love people like him. I eat him for breakfast, lunch and dinner. [¶] Judge, let me tell you something. I came here to testify [to] the best of my knowledge and when I was threatened yesterday by that idiot, you know, I was up all night. You owe me an apology. If you want to throw me in jail today I don't give a--this judge rules over here. If he wants to egg me on, we can go somewhere and he can egg me on all he wants. He's dealing with the wrong guy. I was raised with putzes like that. He is a jerk-off.

"THE COURT: His job is to ask questions.

"THE WITNESS: It's not to intimidate or lunge after someone. Come on, I am college educated. Don't talk to me that way. If you threaten me again boy--I don't care what he says. I don't care what these guys do. You understand? You open your mouth to me like yesterday, that's it. Fini, good-bye.

"THE COURT: Sir, I will remind you that your job is to answer the question.

"THE WITNESS: I will answer the question. I just answered the question, but he wants to play cat and mouse games here.

"THE COURT: I see that, and you are playing into that very well.

"THE WITNESS: He's a jerk. I think he's high on dope. I used to do dope. Why don't you drug test this moron. I am looking at his eyes right now. You got Danny Devito sitting in back of him, what's with this court here? Danny Devito and the big jerk in front.

"THE COURT: You need to answer the questions and you need to ask the questions. My job is to try to regulate it.

"THE WITNESS: Well, have him ask the questions without the intimidating or that snarling type of--and I am not angry at you. You are a nice judge.

"THE COURT: Maybe he is doing it to get a rise out of you and you are falling for it.

"THE WITNESS: I love risers.

"THE COURT: Well, we don't. So sit tight and answer the questions that are put to you. [¶] Mr. Hingle.

"MR. HINGLE: For the record, I object to the Court's characterization of counsel and request to be heard outside at a later date.

"THE COURT: No, you won't. I will say your behavior is so unprofessional that I have to bring this up in front of the jury. I don't want to do it but you've forced me to do it. Ask this witness some questions. He will give you the answers. This is spinning out of control because of you, not because of me. So ask your questions or you're done.

"MR. HINGLE: Your Honor, at this time I note my objection for judicial misconduct."

The trial court then called a recess and admonished Hingle after the jury had gone: "First, I'm going to start off with your comment, Mr. Hingle, that you want to note for the record that the Court is involved in judicial misconduct. That is contempt of court. That is also violation of my court order when you were ordered on or about February 23rd, 2004 not to make such comments.[7] You have violated that order. [¶] I am going to consider whether I am also going to report you to the State Bar of California and

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[7] On February 24, 2004, at a hearing outside the presence of the jury to address an email from a codefendant's attorney that had mistakenly included the trial court as a recipient and referred to a recent memorandum from the trial court as "drivel," the trial court made the following order after the attorney apologized: "I never thought I would have to make such an order, but I am making an order. I am ordering each attorney to read every written ruling and read each memorandum from the Court. If you do not it will be grounds for contempt without any further prior notice. This will also be grounds for me to report you to the State Bar for inassistance of counsel. I should not have to remind you this impugns the integrity of the Court. Not--to suggest I am not picking a fair jury or not affording these defendants a fair trial is also grounds for contempt and automatic referral to the State Bar. You are all on notice if I receive any more comments you will be held in contempt automatically and automatically be referred to the State Bar for disciplinary action. I will only give one warning in this regard. I do not have the time or the inclination to baby-sit attorneys. If I have any more problems you will take it up at the State Bar."

perhaps have contempt hearings at the end of this trial. [¶] The next point I'd like to make is that you would never say something like that unless it was your reason and your intent to tell the jury that you believe that the integrity of the Court is in question, because there is no possible other reason why you would do that. [¶] Thirdly, I never heard anybody make such a remark or an objection in front of the jury, one doesn't exist, so it is inconceivable that you would even do that. And rather than upgrade you in front of the jury, because these are very serious issues, I wanted to make sure that I made a clear record outside the presence of the jury. [¶] Next, your questioning of this witness is outside the scope of what attorneys should be doing in this trial and in any trial. Your tone with this witness is inexcusable. Your loudness with this witness is inexcusable given that you almost had a fight with him yesterday. And I told you that if this continued you would be doing questioning from your seat. I thought I could trust you to be professional, but you're not. [¶] You're not allowed to yell at the witness in the way that you are. You are not allowed to make snide comments at him, such as I've got all day long. And you are not allowed to go up to the witness and drop exhibits in front of his face from a height that is intended purposefully to show you were dropping things in front of his face as you turn and walk away from him in a very disrespectful way. This is a trial, Mr. Hingle. This is not some circus sideshow. [¶] I am going to at this time suspend your questioning of this witness under [section] 765 of the Evidence Code, under [section] 352 of the Evidence Code, under [section] 350 of the Evidence Code, under the case *People v. Miller*, [(1960)] 185 Cal.App.2d, 59 at [page] 77, and under Penal Code section 1044. [¶] If you have any more questions of this witness you will present them in writing to me and I will make sure they get asked, but you cannot control yourself with this witness and I do not want to jeopardize your client's ability to cross-examine this witness, but it's not going to be done through you." Hingle then disagreed with the trial court's characterization of his behavior and explained that he had made the judicial misconduct objection in front of the jury because he understood from the trial court's

remarks that he "would not be allowed to be heard outside the presence and . . . made what [he] thought was the appropriate objection to preserve the matter for the record." In the midst of the conversation, the trial court commented, "I don't know what school you went to, Mr. Hingle, but I've never heard of such an objection and I am looking at the list right now and there is not such objection known in the Evidence Code." At the end of the conversation, the trial court concluded: "I will agree with your characterization that you started out polite and okay, but it soon deteriorated. Everybody else in this room asked this witness questions without bringing him to disruption. Twice you examined him, twice he was brought to disruption. Once you started charging at him either because you wanted to strike him or because you wanted him to come down off the witness stand to strike you so he could create a situation, I don't know, but that wasn't acceptable. [¶] And then dropping the papers at him was done in a way that was less than polite and a person who is on the warnings from the Court yesterday you should have been extra polite. You were putting papers in front of him as if you were throwing papers in his face and he was obviously irritated by it, but I didn't make any comment on it, because I just figured I would remain silent and hopefully it would go away, but it did not. And I would conclude with [that] I seriously doubt your emotional ability at this time conducting [yourself] the way you are."

George and Matthew take snippets from the above, lengthy incident and urge that Hingle "became the target of the court's wrath, and judicial misconduct" and the trial court showed "disrespect" for Hingle. Matthew particularly seizes upon the trial court's comment to the effect that there was no such objection as judicial misconduct.

What is clear to us, however, is that the trial court was faced with an unprofessional, out-of-control attorney who refused to heed repeated admonishments to comport himself properly. And most of the admonishments were made outside the jury's presence. "[T]he court may act swiftly and strongly in the presence of the jury to admonish an attorney if necessary to preserve the integrity of the judicial process."

(*People v. Chong* (1999) 76 Cal.App.4th 232, 244.) Moreover, despite the trial court's admonition on the very topic, Hingle impugned the integrity of the trial court by making his judicial misconduct objection in front of the jury. (*Ibid.* ["By mocking the court's authority, an attorney in effect sends a message to the jurors that they, too, may disregard the court's directives and ignore its authority."].) That the trial court refused to dismiss the jury to hear what Hingle had to say on the topic is no excuse for Hingle's behavior given that, at some future point, the trial would be in recess and Hingle could place his judicial misconduct objection on the record without the jury present. "The court commits misconduct only 'if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression [that the court] is allying itself with the prosecution.' " (*Ibid.*) The trial court's isolated, exasperated remark about what law school Hingle attended hardly rises to a persistent, discourteous, disparaging, and discrediting pattern of behavior.

The fifth incident complained about occurred when Furst questioned witness Timothy Gentile about a matter that had been the subject of a side-bar conference. The following occurred during the side-bar conference.

"THE COURT: This is at the side-bar out of the presence of the jury. Out of an abundance of caution, you are asking questions very similar to the motion which you filed yesterday, which indicates to this court that you may be attempting to go into the area of his conviction.

"MR. FURST: Not yet.

"THE COURT: The reason you are at side-bar right now is, I am specifically ordering each attorney not to ask any questions about this gentleman's 90-day hiatus, about why he was gone, about his crime that was not a crime of moral turpitude. And if any attorney asks any question that even insinuates existence of why he left for that brief period, you will be held in contempt of court. End of side-bar.

"MR. FURST: May I make proffer of evidence?

"THE COURT: No. No.

"MR. FURST: You mean I can't even make a record? I'd like to be heard.

"THE COURT: Making a proffer is different than making a record.

"MR. FURST: I'd like to make a record, Judge.

"THE COURT: Okay. This is Mr. Furst.

"MR. FURST: First of all, the questions that I'm asking right now were not headed in the direction that you foresaw. They have to do with testing his memories. It has to do with his not being able to place things in their perspective. At some point I would like to lay the foundation so that an appellate record would reveal clearly that he has misrepresented--and I won't ask him about the actual hiatus, but I believe that I'm entitled to ask him: 'Is it a fact that you left Dagna and Associates on one or another occasion because of X, Y, and Z?' What he's already said. I'm not going to raise--I'm not going to say that. But I believe that unless I make a record as to the foundation why he clearly, absolutely is lying, that the appellate record will perhaps that--that perhaps that issue will not be cognizable. So I understand what you have just said. I want to ask the questions that surround it without asking him--

"THE COURT: That's fine. Then you better be very clear that your question relates to when he left the final time.

"MR. FURST: Well, I believe that because--and I know that that's a period of time the prosecution will take a purely technical one. He has said it was at one time or another. He clearly has stated again and again that he has trouble placing things in time, timelines. So that I should be able to say--be able to raise the issue of his confusion about time so that I can lay the ground work for later on or having some appellate lawyer later on say that even though he may have said 'time X,' when in fact it was time Y. It clearly goes to his memory.

"THE COURT: Well, that's very clever, but I know where you are going with this. And if you go into that area without a specifically-worded question of this witness, I

will hold you in contempt. And the contempt remedy is not going to be a light one. End of side-bar."

Later, Furst asked Gentile, "The decision that you made to leave the second time had to do with the operation of the business; is that correct?" When Gentile answered, "That's incorrect," Furst asked, "Why did you leave the second time?" This generated an objection from the People and another side-bar conference.

"THE COURT: This is a hearing out of the presence of the jury.

"[The prosecutor]: This is specifically as to what we've already addressed in limine, and that the witness has been told that he could not go into as to his testimony.

"THE COURT: As to the first issue, how is this not in violation of my specific court order?

"MR. FURST: Because you specifically told me not to ask about the issue, the jail thing. I only asked him the question which I know he was going to answer the same way he answered before. It's foundational to be able to establish the appellate record. I want him to essentially tell the lie. He's not going to change it because--

"[The prosecutor]: He didn't tell a lie the first time. [¶] . . . [¶]

"THE COURT: This is a hearing out of the presence of the jury. . . . Mr. Furst, we are going to have a hearing at 4 o'clock today on why you should not be held in contempt of court. We are in recess. And, also, you should cancel your plans for Friday, Saturday, and Sunday."

At the 4:00 p.m. hearing with an attorney for Furst present, the trial court proceeded with "the reading of the alleged contempt." It explained that (1) it had ruled that Gentile's prior conviction was inadmissible, (2) it had ordered the attorneys to refrain from questioning Gentile about why he left Dagna's employ the second time, and (3) Furst asked Gentile about why he left Dagna's employ the second time. It then set a briefing schedule for a hearing on the merits.

George refers to the above incident but does not explain how it demonstrates judicial misconduct. He seizes upon the trial court's comment advising Furst to cancel his weekend plans and claims that it shows that the trial court had prejudged the contempt case. There is no merit to the point.

The trial court was certainly prepossessed. It was entitled to suppose that Furst would be convicted of contempt given that it had made the order that Furst should face a contempt charge. This circumstance exists in every contempt scenario arising from conduct committed in a trial court's presence. In any event, the trial court made the procedural posture crystal clear at the 4:00 p.m. hearing: "I'm advising Mr. Furst that the charge of contempt is being contemplated. I will offer an opportunity for Mr. Furst to explain, provide an excuse, or give an apology."

The sixth incident complained about occurred at another hearing outside the jury's presence when the trial court again admonished the attorneys about their behavior: "First of all, Mr. Furst's motion for a mistrial that was filed on May 24th indicates that the court purposefully allowed the suborning of perjury. You also typed in your motion for mistrial that the court, quote, the court's knows better, close quotes, or words to that effect. Both of those are contemptuous comments. And I am both giving you a warning and instructing you that if you either say those kinds of words or type those kinds of words, that we will have to have a hearing on that. [¶] Mr. Siino, your motion for mistrial filed on May 24th, you indicated the court is not fair. I warned you not to make such comments in front of your client. I am now making it clear that I don't want those comments made at all in any filings in front of anybody else, or within earshot of any court staff, the court, or if I hear reports that you are saying that, we are going to have a contempt hearing on that. [¶] Next, your comments that the Court is engaged in petty vindictiveness is also contemptuous. Your comments in your May 24th filing that the Court has emotional instability is contemptuous. I'm giving you a warning at this time. If those comments continue, there will be an immediate contempt hearing. [¶] And the

Court is adding these items to the list of the potential contempt hearing we are going to have for you at the end of the trial. Regarding the questions of witness Gentile yesterday, when you asked, Mr. Siino, 'Isn't it true that you have the same problems that you complained of in the other co-workers,' the only answer that you were seeking is one that contained the information that Mr. Gentile suffers a conviction for battery, or an arrest for a D.U.I., or an arrest for drug possession. Some of which what happened during a time during which Gentile did not work for Dagna and Associates [DSA]. All of which the Court ruled are inadmissible. [¶] If you ask a question like that again of this witness or any witness that is in violation of my court orders or rulings, that will be considered contempt. And I'm giving you notice at this time that we'll have contempt proceedings."

Siino apparently did not understand the trial court and asked, "What is the notice, your Honor?" To this, the trial court summarized: "That if you continue to violate the court's order through your questioning of witnesses that you know the answer is going to elicit a response that this court has already ruled is an inadmissible item, that we will have contempt proceedings against you."

The trial court continued: "Regarding Mr. Hingle. Yesterday, you asked Mr. Gentile: Where did he learn how to do a headlock? Although, that could be interpreted many ways, I believe it's cutting very close to trying to elicit from this witness that he'd been in fights before, and that he had been arrested for a battery, which the Court has already ruled is inadmissible. [¶] I'm putting you, Mr. Hingle, on warning that although this came close, and I would not have made note of it otherwise, since this is becoming a recurring problem, if you ask more questions of this witness or any witnesses that seems to indicate that you are trying to circumvent a court order, we will begin contempt proceedings immediately. [¶] Mr. Hingle, you also asked of Mr. Gentile: How high would you rank Dagna's driving your car with alcohol in your decision to quit? Although, your real question was: How high would that rank? That was the [tenor] of your question. That is, to this point, impermissible for the same reasons. [¶] Also, your

question was that simply he was drinking. That, also, is an attempt to back-door the Court by trying to open the door for yourself to the issue of his arrest for D.U.I., which the Court has ruled is inadmissible. And if you continue with that line of questioning, or any questions like that of this witness or any witness, it is a violation of a court order or ruling. We will begin contempt proceedings immediately." Hingle admitted questioning the witness in such a way as to open the door to the impermissible evidence. After he explained that he thought that the door had been opened for his questioning, the trial court corrected Hingle: "That's not true. That's not accurate. I specifically told all counsel that door had not been opened and you cannot ask the questions until it had been opened. So, do not say you did not know. [¶] Now, the other thing is, I don't appreciate you circumventing my court order, because you admitted that's what you were trying to do. [¶] This is a big trial with a lot of big issues. And you've got a lot of work to do to defend your clients; just as the People have a lot of work to do to put on their case. And for some reason you are getting into areas that you shouldn't be getting into, because at the end of the trial this is going to be such a minutia issue that the jury is rarely, if ever, going to consider. So why would you risk your bar license on an issue that is so small? And I think everybody needs to take a deep breath, take two steps back, and remember what they are here for." Nevertheless, two days later the trial court again addressed Hingle on the same topic outside the jury's presence: "Yes, I have some thoughts. Don't ask why he left the second time. Don't infer that he was in jail. Don't infer that he suffered a battery conviction. Don't infer that he was in a fight. Don't infer that he is a violent person. Don't infer that he has a propensity for violence. [¶] And if you need to sit down with your witness before you ask that question to make sure the witness understands not to go into that area, that's your obligation. Because if you don't do that, we're going to have another contempt hearing and it's going to be you. [¶] . . . [¶] Don't make it complex. You understand what you need to do. You understand your obligation. You understand my rulings. If you are lax or lazy or incompetent or dangerous or ask

questions that are open-ended, or you keep driving up the same point which you've been driving up for days with this witness, you're going to get the result that you're asking for, but it's not going to be the remedy that you're asking for. [¶] And just so it's clear, because I want to make sure it's clear, that there's no misunderstanding, if you go into this area, you're going to be held in contempt of court. So don't give me these clever, interesting, amusing renditions of how we might trip upon it. Because if that's in your head now, you have an obligation to let that witness know we're not to go into that area. That's your obligation."

George and Matthew rely on the above. They claim that the trial court threatened them with contempt but fail to explain how the warnings amount to judicial misconduct that endangered their rights to a fair and impartial trial. Again, it is clear to us that the trial court was faced with unprofessional, out-of-control attorneys who impugned the integrity of the trial court by accusing it of suborning perjury, being unfair, engaging in petty vindictiveness, and being emotionally unstable, all the while attempting to circumvent a simple order excluding evidence. That the trial court was patient enough to go outside the jury's presence and issue so many repeated warnings rather than simply make contempt citations cuts in favor of the right to a fair trial instead of against it. In short, the trial judge cannot be faulted for not permitting the attorneys to run the show--any strained relations that might have resulted are not evidence of bias or prejudice. (*Roitz v. Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 724.)

The seventh incident complained about arises from Hingle's objection to a line of questioning pursued by the prosecutor in direct examination of witness Mark Foss. The objection was sorted out in a hearing outside the jury's presence.

"THE COURT: This is a hearing outside the presence of the jury and outside the presence of the witness.

"[The prosecutor]: I do want to go into the fact that the witness had an extreme drinking problem. He was drinking on a daily basis including while he was making these

solicitation calls. The reason he was not showing up sometimes [*sic*] he was inebriated and he would get these calls from Matthew Kellner to come in. And the reason he had to be paid on a daily basis was in part of his ongoing alcoholism that affected his ability to show up for work.

"THE COURT: My first question is: How is this relevant because lots of companies have this situation with an employee and it doesn't make them legitimate or illegitimate. [¶] And secondly, I don't have a problem of you asking those questions if they are found relevant, because they are not in violation of my court order. As you know, you need to draw a distinction whether it's at the work place or not, whether it's a crime of moral[] turpitude or not. You can ask him if he was absent, but if it goes into areas that you're not supposed to go into. I don't know if this is him being incarcerated or--

"[The prosecutor]: No, I just want to go into the fact that he was commonly drinking on the job, that he was basically being, that his description was he was controlled by his alcoholism that he needed that daily pay and that they knew that he needed that daily pay because he [had] an extreme alcoholism problem and it was a way to manipulate him as an employee. So they were using his alcoholism to manipulate him in terms of doing the work of the organization.

"MR. HINGLE: May we be heard?

"THE COURT: Yes, Mr. Hingle.

"MR. HINGLE: This witness on page 11 and 12 of your very extensive order of crimes of moral turpitude where it lists Mr. Foss there are no alcohol related crimes that you have delineated that can be used against this witness. I object to any impeachment of this witness other than the crimes of moral turpitude that the court has already delineated and I think this is improper character evidence that they are trying to sneak in front of the jury to defame our clients.

"THE COURT: I don't know where you get that information because she's saying he was drinking on the job assuming that's true, that's relevant. She's saying he didn't come [to] work all the time. I'm assuming that's true, that has some small relevance and she's indicating that there is some manipulation of him by keeping them on a short leash so they can keep a non-alcoholic making telemarketing calls, which is arguably which she will have to save to closing argument but she can illicit facts which have some relevance to that at this point.

"MR. COKER: But not his opinion to that extent.

"THE COURT: I don't think she can.

"MR. HINGLE: Your Honor, and I don't mean to--

"THE COURT: Has he testified to this at the Grand Jury--

"[The prosecutor]: Yes.

"THE COURT: --that he fel[t] he was manipulated.

"[The prosecutor]: He testified that he had to have this special pay arrangement and his options were limited because of his alcoholism. I can give the court the specific information it's a very long transcript.

"THE COURT: Why don't you bring it in tomorrow morning.

"MR. HINGLE: It appears this is a similar situation that we tried to get into with other witnesses that led to defense attorneys--strike that. This looks exactly like the sort of things that we've tried to get into with Mr. Gentile and we were prohibited from and understanding that the Court's logic in that--

"THE COURT: Well, if you don't see the distinction then you need to go back and read all of the court orders because there is a huge distinction. And I don't know if you are just pretending like you don't know or you really don't know. There is a huge difference so you better study up on that because this is nowhere near the situation where someone was trying to get in a crime of moral turpitude that the court deemed is

inadmissible, because there is no case in this state that allows-- [¶] Mr. Mayfield [defendant Joseph Dagna's attorney] he was next.

"MR. MAYFIELD: I don't want to rehash the situation with Mr. Gentile except to say that my purpose and my writings of Mr. Gentile were not aimed at his criminal conviction, only at his reason for not being there which had to do with being in jail. [¶] I believe that that is the same as the question that the People just asked which is any physical reason you were not showing up, which I have the Court's order directly right in front of me, which I believe to be a question that is in opposite to the Court's order. The Court correctly stated--

"THE COURT: But his question and this witness will not reveal any inadmissible evidence. I can't believe that we are having th[is] discussion. I can't be any clearer on this point and I am not going to belabor it other than to tell you to go back and read the order. And if you don't understand the differences don't ask any questions in that area because it is at your peril. And that's not this Court's problem it is the inability of the attorneys to face up to the Court's rulings or it's a hoax on the attorneys upon the Court right now, or you are lacking the basic lawyer skills that would enable you to draw fine distinctions. So I would ask you to study that tonight because this is a very big difference and I don't need to have another problem in this regard."

Matthew does not explain how the above incident constitutes judicial misconduct. What comes through loud and clear is that the attorneys either did not understand or feigned ignorance as to the distinction between their questions designed to elicit that Gentile was convicted of or jailed for battery, a subject that the trial court had ruled inadmissible, and the prosecutor's questions designed to elicit that Matthew was able to manipulate Foss because Foss was an alcoholic, a subject that the trial court had not ruled inadmissible. Under the circumstances, the trial court demonstrated restraint rather than misconduct.

The eighth incident complained about is what George characterizes as an "acerbic comment" made to Coker by the trial court when Coker objected to a prosecution direct-examination question by asserting, "Objection based on the in-limine rulings" and the trial court replied, "Overruled. You must have been in some other trial, to me that never came up."

As before, George fails to explain how the comment demonstrates judicial misconduct. Although it may have been better to simply overrule Coker's objection, the trial court's comment did not express bias or prejudice but rather explained that the prosecutor's question was not within the scope of any in limine ruling excluding evidence.

The ninth incident complained about arises from yet another speaking objection when Siino interposed the objection, "Your Honor, you didn't allow these questions on examination," and the trial court again excluded the jury and witnesses to sort out the matter.

"THE COURT: This is a hearing out of the presence of the jurors and the witness. [¶] Mr. Siino, I specifically ordered you not to make speaking objections. You have been repeatedly told not to make speaking objections. You will apologize to the Court right now, or we will begin contempt proceedings at this moment.

"MR. SIINO: I--I wish to apologize to the Court, your Honor. When I made that statement, I wanted to approach, but I have a bad leg. I didn't know if the Court noticed. And it's very difficult. And I didn't want to waste the Court's time in asking to approach, because it would take me awhile to get up there.

"THE COURT: I don't accept your excuses.

"MR. SIINO: Okay. But I wanted to explain why off the top of my head I made a comment that I should have not made. I should have asked to approach.

"THE COURT: I know why, because you are unprofessional, and you are rude. You apologize and sit down, and don't do it again, or we'll begin contempt proceedings."

After the jury returned, the trial court advised it as follows: "Okay. Ladies and gentlemen, some comments by attorneys may be viewed by you as certain parties in this case are being railroaded or not receiving a fair trial. I assure you that everybody in this case is receiving a fair trial. Nobody is being railroaded. I make my rulings based upon the Evidence Code and basic principles of law and courtroom procedure. The attorneys are allowed to disagree with my decisions. However, they cannot infer to you that anybody is being treated unfairly. [¶] You should also know that what attorneys say is not evidence, and if I need to stop a proceeding to talk to an attorney or attorneys, you must remember that sometimes I have to redirect the attorneys, but in no way is that a reflection or a comment or any indication by me as to an attorney's abilities, his client being guilty or not guilty, the witness's testimony, or any evidence in this case."

As before, George assumes that judicial misconduct is to be found in the above incident but he does not explain how that is so. Given what had occurred before this incident--painstakingly recounted in the first eight instances of supposed judicial misconduct--the trial court was fully justified in supposing that Siino had inexcusably transgressed a court order having the effect of impugning the integrity of the court in front of the jury. The trial court's closing comment to Siino--again, outside the jury's presence--spoke reality rather than judicial misconduct.

The 10th incident complained about arises from yet another speaking-objection incident that had its genesis in Hingle's objection to a prosecution direct-examination question that required another hearing outside the jury's presence.

"THE COURT: This is a hearing outside the presence of the jury. [¶] I'd like some indication where this is going. You've already established this line of questioning through other witnesses. Why do we have to do it with this witness as well?

"[The prosecutor]: I wasn't through Jerry Hall able to establish the meaning of the answer because I didn't have the questions that I could present to the jury. So now I am simply trying to give some context to the answers.

"MR. MAYFIELD: But you realize this forces me to go back through questions that have my client's name in them. Is he included? Did you write a check to my client? Did my client write a bad check to you, which is just an incredible waste of time because we know that he didn't, and we know that there is no such organization.

"[The prosecutor]: He did write checks to your client.

"MR. MAYFIELD: He wrote one check because there was a bounced check.

"THE COURT: The parts that interest me is why are we have [*sic*] this witness testify whether or not Mr. Tiano was getting $2,000? It's already been established through other witnesses. It's corroborative, and we don't have time for corroboration. None of these charges need corroboration. Let's move on.

"MR. HINGLE: My objections are based--I do not believe that's been established. I think the only thing that is established is there is occasion for the bank to have $2,000 listed on it. I don't believe there are any witnesses that testified that he told me he was getting $2,000. There was one witness that testified that he disclosed he had an interest, but he didn't state what that interest is. And I am objecting on assuming facts not in evidence because there is no witness that came in and testified he was getting $2,000. And that's the basis for the assuming facts and lack of foundation.

"THE COURT: That's good argument by a good lawyer. However, my rulings are based on whether or not there are facts within the evidence. There are facts within the evidence. You left out some, which is testimony he had $2,000. Whether it's true or not, I don't know. Nobody knows. That's why the jury is here, to decide if it's true. [¶] But I am glad you bring that up because, Mr. Hingle, you bring up a lot of objections that have no foundation and are beyond the realm of what is reasonable to object to. And I would just note every time you object, that doubles the time of this trial. You can object to what you want if you have a good faith belief what you are objecting to not some esoteric, academic, bizarre reason that nobody else in the room recognizes."

The jury returned and the following colloquy took place.

"Q (by [the prosecutor]): Were you ever aware of any bank accounts that were controlled by [FEG] for DSA where they controlled the checkbook?

"A [the witness]: There was one account that I was aware of. It was a bullet account. I think they opened at Bank of the West, and they used that to solicit funds via advertisement and so on to support 'The Bullet' publication, which is the DSA newspaper.

"Q: Did you ever see any account statements for that particular letter account?

"A: No, I did not.

"Q: Did you ever see a check from that particular account?

"MR. HINGLE: Objection, relevance.

"MR. COKER: I join in the relevance--

"THE COURT: Overruled.

"MR. COKER: 'The Bullet' account--as far as accounting for 'The Bullet.'

"THE COURT: Mr. Coker.

"MR. COKER: I'm sorry, your Honor, I don't understand your anger, but I am objecting to the--

"THE COURT: First of all, I don't have anger. Secondly, what I would like you to do is focus on what is expected of you, which is you say objection and then the basis for the objection.

"MR. COKER: But I am telling you what I am objecting--

"THE COURT: If you need a copy of the objections recognized in the State of California, I will provide those to you, and that's all I will accept from any attorney in this case because we do not have time to listen to meandering. So give us the objection and the basis for the objection. If I need more information because I don't know what you are talking about then I will have you come to side-bar. I know what you are talking about when you are making the objection.

"MR. COKER: But I wasn't objecting to the whole question, just the part of 'The Bullet' account. I want you to know that. And on relevance, and that was my ground, relevance on accounting to 'The Bullet' account.

"THE COURT: Very well. It's overruled."

Again, George and Matthew do not explain how the above incident demonstrates judicial misconduct. Although George complains that the trial court "severely berated" Coker and Matthew complains that the trial court subjected Hingle to "humiliating treatment," we again glean restraint rather than misconduct in the face of the trial court's repeated admonishments to refrain from making speaking objections in front of the jury and the attorneys' repeated refusals to heed those admonishments.

As an 11th incident, George states that the trial court "returned to this theme" during the following month when Coker made an objection in the midst of the following multiple-objection colloquy after a prosecutor's redirect-examination question.

"MR. HINGLE: Objection; compound, improper hypothetical, outside the scope of his tendered expertise, outside the scope of any cross-examination.

"MR. COKER: Your Honor, I also object on the ground of custodian of records. There is no evidence of that outside the evidence. And I also object to the question of would you expect as opposed to would it be required by law, so with regard to those questions beyond the scope and beyond his expertise as far as expectations.

"MR. SIINO: I would object to lack of foundation.

"THE COURT: As to Mr. Hingle, the objection; is overruled. [¶] As to Mr. Coker, could not formulate an objection; that is recognized in the State of California. [¶] As to Mr. Siino the objection; is overruled. The court is imposing its own objection; under [Evidence Code section] 352."

George complains that "the court simply overruled the objection as to Mr. Hingle and Mr. Siino, but as to Mr. Coker the court gratuitously stated, 'As to Mr. Coker . . . .' "

" '[J]udges presiding at trials should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.] ' "The [trial] judge has a duty to be impartial, courteous and patient . . . and its violation may be so serious as to constitute reversible error." ' " (*People v. Burnett* (1993) 12 Cal.App.4th 469, 475.) A judge's comments are evaluated " 'on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.' [Citation.] 'The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.' " (*People v. Sanders* (1995) 11 Cal.4th 475, 531-532.)

While we again agree that it would have been better to have simply overruled Coker's objection, the trial court's comment did not express bias or prejudice or amount to " 'discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression [that the court] is allying itself with the prosecution.' " (*People v. Chong*, *supra*, 76 Cal.App.4th at p. 244.) The court examined a similar comment in *People v. Knocke* (1928) 94 Cal.App. 55. There, trial counsel had objected to a question asking the owner of stock about the value of the stock and the trial court had responded as follows: " 'The owner of anything may testify as to the value of anything he possesses. I am surprised that anyone who has gotten by the Bar Association Examination should raise that question. The objection will be overruled.' " (*Id.* at p. 58.) The court explained: "The trial judge was manifestly correct in the ruling, and while it would have been more in keeping with the decorum which should attend the trial of an action at law and more in harmony with the judicial dignity which should characterize the pronouncements of those to whom is entrusted the delicate power of sitting in judgment not to have expressed his surprise, it is undoubtedly true that there was no serious reflection upon counsel and none which could not easily have been rectified." (*Ibid.*) Moreover, the trial court's comment in this case can be construed as a rebuke for making

yet another speaking objection in disregard of the trial court's previous admonishments against making speaking objections. Events happen rapidly during the course of a trial and it is not always feasible to excuse the jury in order that counsel may be reprimanded for defying the authority of the court. (*People v. Chong*, *supra*, at p. 244.) "[T]he most that the jury could have reasonably inferred would have been that in the opinion of the judge [George's counsel] was deficient in intelligence or understanding. It cannot be assumed that this intimation prejudiced the jury against [George], for it could reasonably have had the contrary effect." (*People v. Cramley* (1913) 23 Cal.App. 340, 348.)

As a 12th incident, Matthew complains that the trial court admonished him outside the presence of the jury as follows: "Mr. Matthew Kellner, please do not make very loud audible yawns during the presentation of the evidence. Nobody is yawning during your presentation. Please don't yawn during other's as an indication to the jury this is boring." He cites the incident as an example "of the trial court's disdain for" him. But he ignores the principle that a trial court is unquestionably entitled to control the proceedings to the extent of asking for courtesy in the proceedings.

As a 13th incident, Matthew relies on the following colloquy that began with the trial court asking Hingle how long he expected to examine a witness and ended with another behavioral admonishment outside the presence of the jury.

"MR. HINGLE: Your Honor, I would anticipate that I will be at least another hour and a half with this witness, and I may go through the remainder of the day.

"THE COURT: Okay. Well, ask him the question you want the answer to. Don't creep up to it, because we don't have time to creep up to it. If you want to know about a statutory issue, ask him the bottom-line question that will be relevant.

"MR. HINGLE: May we approach, your Honor?

"THE COURT: No.

"MR. HINGLE: Requesting a point when it's convenient for the Court to have the matter heard outside the presence of the jury.

"Q. As to--

"THE COURT: Ladies and gentlemen, step out in the hallway, please. [¶] . . . [¶]

"THE COURT: Okay. This is a hearing outside the presence of the jury. [¶] Mr. Hingle, I am ordering you and all the attorneys in this trial not to communicate directly with the jury. If you do it again, you will be held in contempt. That is your notice. That is your warning. [¶] Thank you.

"MR. HINGLE: Your Honor, may I ask the nature of this if it's directed at me? I have no idea what the Court is referencing. I asked to be heard outside--

"THE COURT: You will find out what the reference is during your contempt hearing if you continue like this.

"MR. HINGLE: Your Honor, may I--

"THE COURT: Your comments--you face the jury. You make that statement. It's not directed at me. It's not directed at the court reporter. It's obviously a statement directed to the jurors. That's inappropriate. Act professionally. [¶] Bring in the jurors.

"MR. HINGLE: May I be heard further?

"THE COURT: No, you may not."

Matthew acknowledges that judicial misconduct is conduct that is sufficiently egregious and pervasive that a reasonable person could doubt the fairness of the trial. But he fails to explain how the above incident qualifies as judicial misconduct. We glean that Hingle directed comments to the jury rather than the trial court and the trial court ordered him to stop at yet another hiatus outside the jury's presence. No judicial misconduct is apparent.

As a 14th incident, Matthew recounts his own direct examination in which he repeatedly gave nonresponsive answers despite the trial court's repeated admonitions such as (1) "listen carefully," (2) "the Court can't have a narrative," (3) the "run ons" will "always draw an objection," (4) "just think about the answer before you give it and just give that answer," and--outside the jury's presence--(5) "stop inserting hearsay

statements into this trial. [¶] You've sat here for six months so you know what hearsay is. You've been instructed numerous times to stop saying what people told you. You are ignoring the Court's instruction. From this point forward if you do it I will instruct the jury that you are doing so willfully and they are to ignore your testimony in that regard." Thereafter, Matthew's persistent nonresponsiveness generated sustained objections, motivated the trial court to strike two answers sua sponte, and resulted in yet another hearing outside the jury's presence during which the trial court explained that it had stricken Matthew's answers because they were nonresponsive and concluded that Matthew was either choosing to disregard or was incapable of following the admonitions.

As before, we are impressed with the trial court's restraint under the circumstances. No judicial misconduct is apparent.

As a 15th incident, Matthew refers to his testimony about criminal and civil cases against him in Colorado arising from SBP's fundraising for the Denver Police Protective Association (DPPA).

After sustaining a relevancy objection to Hingle's question that attempted to accuse the DPPA of instigating the criminal case, the trial court held yet another hearing outside the jury's presence to explain to Hingle that it was not relevant whether the victim supported a prosecution because the state prosecutes whether or not the victim desires prosecution. Hingle resumed his questioning by asking Matthew whether (1) the district attorney and DPPA communicated, (2) the civil settlement negotiations included an offer to settle the criminal case, and (3) the criminal settlement included payment to DPPA in the civil case. The trial court sustained relevancy objections, instructed Hingle to "Move on to another area," and excused the jury to admonish Hingle during the following colloquy.

"THE COURT: This is a hearing out of the presence of the jury. [¶] Mr. Hingle, you are ignoring a specific court order. You are re-asking the same question three times.

If you do it again, we will begin contempt proceedings, because it is contemptuous, and it is in the presence of the Court.

"MR. HINGLE: Your Honor, I believe I'm entitled as a defense attorney to try to probe the issue, even though the Court has said I cannot ask one question, to try to ask another question that is not objectionable. And that's what I'm trying to do.

"THE COURT: Did you hear me--did you not hear me say, 'move on to another area'?

"MR. HINGLE: Your Honor, that is not clear in my mind what that means. To me that means don't ask that same question again. [¶] I'm trying to establish the relevance between the civil action and the criminal action, which I put in the pleadings I filed on August 24th. [¶] There were discussions this morning as to the civil action. And I once again reaffirm that I believed that the civil action was relevant to the criminal action. There was no statement by the Court at that time that it was not relevant. There was no objection by the district attorney at that time that it was not relevant. [¶] It appears now that I am being prohibited from going into a matter that we dealt with in limine, and I was given absolutely no indication by the Court or objections from the prosecution that I would not be able to delve in the relevance of the civil action and the criminal action. And this is coming after I have introduced documents into evidence of both actions. [¶] I think that I, quite frankly, have been bushwhacked by the prosecution; if, in fact, this was their position, they should have stated it in limine. [¶] And if the Court's position was that I would not--this would not be relevant, I believe I should have been told that beforehand. [¶] How am I with the Court--with the Court's rulings, I can only assume now that the Court is saying that it is not relevant--there is no relevance between the criminal and civil actions, but is doing so after we raised it in limine, and is doing so after I've introduced the documents in evidence. [¶] I am at a loss as to why this is occurring when I believed that this had happened beforehand. And I guess I seek clarification now. [¶] Is the Court now saying there is no relevance between the criminal

action and the civil action? And I'm asking for a ruling from the Court as to the relevance between the civil action and the criminal action. And the Court has sustained two objections in that area, and I had thought, from the discussions this morning, that I was not going to be prohibited from delving into the interaction between the criminal action and the civil action. I even gave proffers this morning.

"THE COURT: Your mental gymnastics and your clever lawyering does not excuse you from your conduct. If you do not understand what 'move on to another area' means, then you should learn very quickly what it means, because you do so at your own peril. [¶] You know very well when I say, 'move on to another area,' it does not mean do not ask the same question again. That that does not have that meaning under any common meaning, any dictionary meaning, or any meaning on this planet. So when I say, 'move on to another area,' it means move on to another area. [¶] I have ruled on this issue. It is irrelevant. Do not try to buttonhole the Court by giving me the option of saying whether the civil and the criminal actions have nothing whatsoever to do with each other. You know and I know that they do have something to do with each other, because that is your position. That is the People's position. And this is what the Court made its ruling on. So, I will not make that finding. [¶] My ruling as to why it is not relevant was explained at side-bar three seconds before you asked the question. If you have a short-term memory problem, you need to have that checked out. [¶] The reason why it is irrelevant is when the state brings an action, it doesn't matter whether there is collusion by a victim or not. What matters is the state believed there was enough to bring an action. Your client pled guilty to this charge. So, don't pretend there was some kind of a collusion going on. [¶] Secondly, once you open the door to what happened in these settlement conferences by way of hearsay, we are going to have a mini trial on what the police said to him, what the lawyers said. [¶] You've had this witness on the stand for one week. If you haven't noticed, the jury has probably heard about enough as they can hear. So, you need to focus on what you need to do in this trial in defending your client.

[¶] We are not going to have a mini trial on what happened in Colorado under [Evidence Code section] 352. I'm not going to allow hearsay. I'm not going to allow . . . any irrelevant information. You can still make your point. You can still show it was just a civil dispute. But your client pled to it, and you cannot escape that. So you need to deal with the facts and stop making up facts. [¶] And when I say 'move on to another area,' it means move on to another area."

Again, Matthew fails to explain how the above incident rises to a level of judicial misconduct. What we glean from the record is Hingle's refusal to accept the trial court's relevancy ruling, his attempt to circumvent the ruling, and his refusal to comply with the trial court's order to examine Matthew on a different subject. As we noted about an earlier incident, the incident here illustrates attorney misconduct rather than judicial misconduct.

As a 16th incident, Matthew again highlights his nonresponsiveness and complains about admonitions given and comments made to him by the trial court during the prosecutor's cross-examination, namely, the following three instances.

A. "THE COURT: Just a minute, Mr. Kellner. [¶] For the record, Mr. Kellner is not responsive. He keeps yelling over [the prosecutor]. He won't stop when the court tells him to stop and the court reporter had to throw up her hands because Mr. Kellner does not listen. [¶] Mr. Kellner, listen to the question, think about it and give an answer. I am sure you have lots of important information you want to tell the jury and I am sure it is important, but that's what your attorney's job is to bring it out through cross-examination or his examination. Right now you answer [the prosecutor's] questions and keep it to a yes or no unless you need to explain your answer, but just going off and telling a story is not what we do in court. Okay? Thank you."

B. "MR. HINGLE: Objection, vague and ambiguous as to which of the different programs and/or receipts.

"THE COURT: Overruled.

"[Matthew]: The answer to your question is it wouldn't say to [the] public that you could write this off as a charitable donation, it would in fact say the opposite.

"[The prosecutor]: I am going to stop you, Mr. Kellner.

"[Matthew]: This is a trick question to make you think that. What that's for is for the organization.

"[The prosecutor]: Your Honor--

"MR. HINGLE: Objection.

"[Matthew]: It is for the organization.

"THE COURT: Mr. Kellner, when [the prosecutor] objects you need to stop.

"MR. HINGLE: Your Honor, I object. She's not objecting, she's saying I want to stop you.

"THE COURT: Well, if he was being responsive that would be no problem. He is not being responsive and that is also indicative of your client not following the Court's instructions. So let's take this step by step. Try again. Better yet let's take a break now and you can think about that question and come up with an answer that's responsive."

C. The third instance is one we have mentioned earlier in addressing Matthew's ineffective assistance of counsel claim where the trial court was constrained to remark outside the jury's presence that Matthew was perhaps the most nonresponsive witness it had ever seen and admonish Matthew outside the jury's presence that it would tell the jury he was being nonresponsive if he continued being nonresponsive.

It is of course permissible for the trial court to instruct a witness to answer questions in a proper manner and to obey the court's rulings on the evidence. We

suppose from the above that the trial court was endeavoring to do just that. Matthew makes no convincing argument to the contrary.

Matthew likens this case to *Haluck v. Ricoh Electronics, Inc*. (2007) 151 Cal.App.4th 994. We disagree with the comparison. We need not detail all of the numerous instances of judicial misconduct enumerated in *Haluck*, but if there is a single theme in *Haluck*, it is that the trial judge's various comments and actions *in front of the jury* conveyed *to the jury* a distinct *partiality* in favor of the defense. That partiality may have influenced the jury to return a defense verdict when a fair trial might have yielded a plaintiff's verdict. (See *id.* at pp. 1008-1009.)

We liken this case to *Miller v. Western Pac. R.R. Co.* (1962) 207 Cal.App.2d 581, where the court rejected 11 claims of judicial misconduct by concluding as follows: "The record indicates that the appellants were accorded a fair and impartial trial and that the trial judge presided with courtesy and patience. The record is devoid of any indication that the appellants were not given a full opportunity to present their case. Each of the claimed instances of prejudicial error, when read in their proper context, disclose that they arose in conjunction with the court's discussion of the propriety of the admissibility of certain evidence, the validity of objections thereto, the reasons for its rulings, or the clarity of the language in which a question was framed." (*Id.* at p. 606.)

VII. ADMISSION OF TELEVISION NEWS STORY

Matthew contends that the trial court abused its discretion by admitting an edited DVD of a 1993 television news broadcast having "little probative value but which presented the danger of undue prejudice to Matthew."

During in limine proceedings, the parties extensively contested the admissibility of two broadcasts that the People summarized as exposing "defendants' unscrupulous fundraising activities." One broadcast occurred on October 24, 1992, and the other occurred on November 13, 1993.

The People argued that the broadcasts were relevant for the nonhearsay purpose of showing the defendants' knowledge. One of the target crimes of the conspiracy count was soliciting charitable donations by false statement of fact, either willfully or negligently (negligently being defined as "without due consideration of those facts which by the use of ordinary care he or she should have known" (§ 532d, subd. (a))). According to the People, some of the defendants viewed or learned about the broadcasts but continued to make false statements, amounting to at least negligence in light of the broadcast. And the People added that Tiano viewed or was aware of the broadcasts yet nevertheless entered into a business relationship with the Kellners to raise funds by means of false statements. The People also argued that the broadcasts were relevant for the nonhearsay purpose of showing the defendants' motive. One of the overt acts of the conspiracy count (No. 6) was that Tiano took steps to prevent the DSA membership from viewing the broadcasts so as not to jeopardize the DSA contract with SBP. Another overt act (No. 7) was that the Kellners feared damage to SBP because of the broadcasts and used their mother and a low-level SBP employee to incorporate FEG so as to conceal their own role in FEG while continuing their fraudulent fundraising activity. As to whether the broadcasts were prejudicial, the People urged that they were tame when compared to other evidence the jury would consider, such as evidence that defendants conspired to solicit donations on behalf of the widow of a police officer killed in the line of duty, collected tens of thousands of dollars in this endeavor without the widow's permission, and pocketed all of the donations.

The defendants joined in each other's objections, which, as relevant here, basically urged that the probative value of the broadcasts was substantially outweighed by the undue prejudice that would result from admission of the broadcasts. They urged that the evidence was 10-year-old publicity that would poison the jury with accusations similar to those being tried. They argued at the hearing that "By any objective view of the tape it's a subjective hit piece" made by a journalist who cannot be questioned as a witness due to

his invocation of the reporter's shield law. They commented: "Simply, Judge, those tapes are so hot and so biased and so prejudiced that this defendant and his brother would lose not only the right to a fair trial, but the right to confront a witness. It puts such a taint on these proceedings I don't believe it could be overcome with the limiting instructions."

At this point, the prosecutor offered to edit the broadcasts to address defendants' concerns. After reviewing an edited version of the 1993 broadcast, the trial court invited arguments after summarizing as follows: "Then we viewed a videotape from KTVU from '93 which is the modified videotape. The People at the Court's suggestion took out all persons who would not be testifying in this trial, all hearsay statements, and all of the banter between the apparent anchor person and the apparent investigative reporter that shows them talking back and forth about what a terrible thing this is which I thought was not helpful to the jury and not evidence. [¶] I have indicated tentatively to all parties that I find that the evidence of this videotape is relevant and it is admissible on the issues raised by the parties which includes to Mr. Lowney's presentation, who is the D.A. in this case. It goes to show notice. It goes specifically to overt act 7 and it goes to specific intent and knowledge of the defendants, because this aired in 1993, if they continued to raise funds using the same practice which were illegal practices per the allegations and the statements of the People." After further arguments, the trial court ultimately ruled the 1993 broadcast admissible after ordering further edits by making extensive deletions on a transcript of the broadcast.[8]

The DVD lasts approximately four minutes.[9] It shows Matthew exiting from a private office into a larger office space having several cubicles and forcibly ejecting a

[8] As for the 1992 broadcast, in lieu of a DVD, the parties stipulated to the jury that KTVU "broadcast a program which was critical of the fund-raising practices of [SBP]."

[9] As permitted by the trial court's order, the People also made use of still photographs from the DVD.

reporter and cameraman from that larger office to the outside and denying an accusation that he was committing a felony assault. It has narration from the reporter and a spokesperson from Ronald McDonald House (RMH) to the effect that (1) a local firefighters union hired the Kellners to raise money for RMH, (2) RMH received complaints about the solicitors' high-pressure tactics that included pleas to help dying children--pleas that were against RMH's solicitation rules, (3) RMH forbade the Kellners from using its name, and (4) RMH received only $7,500 while the Kellners' records showed that they often raised 10 to 50 times as much money as they gave to charity. It shows a donor who expressed a belief that she had donated for children with narration that at least 90 percent of her money plus millions of other donor dollars went to the Kellners with little or often nothing ever reaching intended charities. It then shows a longer version of Matthew ejecting the news crew with Matthew exclaiming (1) "Just get the hell out of here. Out, out. Out of this office. Out, out, out," and (2) "Out. Get your God damned camera out of my God damned office." It depicts George walking through a parking lot and ignoring the reporter's questions about, according to the narrator, "questionable business practices," and statements such as, "We have a lot of complaints from people that say that you haven't kept your promises." It has narration to the effect that the Kellners can run but cannot hide because two former employees were willing to talk. It then shows a former employee stating that "They've pretty much burned everybody that they've come across." There is then narration explaining that the employee told the narrator that the Kellners operated a huge computerized phone solicitation system called the Megaroom raking in huge amounts of cash and the employee affirming that "$30,000 to about $90,000 a week were the deposits." The DVD ends with narration to the effect that, three years after RMH forbid use of its name, a Kellner fundraiser raised money by falsely telling donors that the money would go to RMH.

The prosecutor played the DVD during opening statement. Hingle countered during his opening statement that the DVD was a smoke screen and hit piece having nothing to do with the case. Before the prosecutor played the DVD in conjunction with testimony, the trial court instructed the jury as follows: "Okay. Ladies and gentlemen, the videotape you are about to watch has some statements contained in it which the defendants make statements. Those statements are limited to the defendants who made the statements. [¶] Secondly, there is a voiceover narration that you typically get in newsreels. Mr. Vacar, who I believe is the person who was speaking the voiceover, he has not testified. He may not testify. Regardless, that voiceover is not for the truth of the matter asserted in the voiceover so you should disregard that voiceover as evidence of the truth of what it is that he's saying in the voiceover. [¶] Does everybody understand that? Shaking your head yes. [¶] Does anybody need further explanation? Raise your hands. There are no hands raised." The prosecutor played excerpts of and displayed still photos from the DVD several times during trial. Before the prosecutor played the DVD one final time, the trial court instructed the jury as follows: "Regarding the Channel 2 videotape, again you will remember that it is not for the truth of the matter asserted what statements were contained in that videotape unless that person actually came into court and testified I work at Lucile Packard Hospital and this is what happened. So only that woman's testimony and that kind of testimony that you heard live subject to cross-examination by other parties can be considered by you for the truth of what they said if you deem that would be appropriate to do so. But the mere running of a videotape of persons who have an opinion is not for the truth of the matter asserted. [¶] For instance, if a reporter such as Tom Vacar says Stuart Bradley stole from the public and I am not saying that Tom Vacar said that, I am just giving you an example. If they said something like that you cannot take that evidence for its truth because first of all Mr. Vacar is not here to testify, he is not subject to cross-examination, he could have based all of his information on faulty information. [¶] You know the old adage do you believe

everything you read in the newspaper. It applies in trials as well because what is said in the newspaper or what a reporter says on the TV is often based on faulty information. . . . You know this on your life experience. This isn't true because it didn't happen that way so it's not being offered for the truth of the matter asserted. It's simply one person's opinion and you cannot and may not and shall not use that one man's opinion in any way in your deliberations because the sole reason why it is being introduced is to show the knowledge or the effect or the specific intent of one or more of the defendants. [¶] Although, I will warn you you may find that none of the defendants had any knowledge of that videotape or some of them or all of them, that's for you to determine. But just because Tom Vacar said it's so does not make it so and you cannot use it for that purpose because this is so important I have to make sure everybody understands that. [¶] Does everybody understand that? I am seeing all hands going up. Is there anyone that needs further explanation raise your hand. There are no hands shown. Now the People are going to put on a few pieces of evidence, the People are going to rest and that will be the end of the People's case-in-chief."

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "For this purpose, 'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that ' "uniquely tends to evoke an emotional bias against defendant" ' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

We emphasize that it is the exclusive province of the trial court to determine whether the probative value of evidence outweighs its possible prejudicial effect. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.) And the trial court's exercise of discretion on this issue will not be disturbed on appeal absent a clear showing of abuse. (*Ibid.*) This rule requires that the reviewing court engage in all intendments and

presumptions in support of the decision and consider the evidence in a light most favorable to the prevailing party. (*People v. Condley* (1977) 69 Cal.App.3d 999, 1015.) It also requires that the party claiming abuse of discretion affirmatively establish the point. (*Smith v. Smith* (1969) 1 Cal.App.3d 952, 958.)

Matthew does not dispute that the DVD was relevant for the proffered purposes. As he argued below, his thrust is that "the probative value of the KTVU video was minimal at best, and the danger that it would create undue prejudice against Matthew and other defendants was considerable." Matthew explains that "There was no evidentiary necessity for the jurors to hear Tom Vacar's derisive comments about Matthew and George, to hear Matthew using vulgar language, or to watch Matthew forcibly ejecting a journalist from his office and hear him being accused of assault." He poses that the evidentiary purpose would have been served equally well by a stipulation similar to the one pertaining to the 1992 broadcast, a stipulation that the defendants offered when objecting to admission of the DVD.

We agree that the trial court's balancing of the probative value against the substantial danger of undue prejudice comes perilously close to an abuse of discretion. It certainly was unusual given the general expectation by members of the bar that news articles do not come into evidence. Evidence Code section 352 is a doorway with limits--much can come through but not everything. It appears that the People proved for what the DVD was proffered by (1) the live witnesses who were on the DVD and who testified about the fundraising, and (2) the evidence that the Kellners ceased doing business as SBP and immediately continued operating as FEG. Thus, the DVD was, as Matthew urges, minimally relevant because it was cumulative. On the other hand, Vacar's derisive comments, Matthew's vulgar language, and Matthew's ejection of the journalist have no relevancy and do appeal to the emotions.

But assuming (without deciding) that the trial court erred in admitting the DVD, we conclude that there is no reasonable probability that a different result would have been

reached absent the supposed error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Harris* (2005) 37 Cal.4th 310, 336 [ordinary evidentiary errors do not implicate federal Constitution, and are tested by *Watson* standard].)

Appellate review under *Watson* "focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*People v. Breverman* (1998) 19 Cal.4th 142, 177.) Other considerations under the *Watson* standard have to do with the impact of the erroneously admitted evidence and include the nature of the evidence. (See *People v.* Guerrero (1976) 16 Cal.3d 719, 730.)

Matthew argues that the supposed error was prejudicial for "all of the reasons stated," namely, the nature of the evidence: Vacar's comments, Matthew's language, and Matthew's behavior. We are convinced, however, that the jury would not likely have reached a more favorable result had the trial court excluded the DVD.

First, the trial court admonished the jury with limiting instructions that included a special admonition that essentially told it to disregard Tom Vacar's comments. We presume that the jury followed the instruction. (*People v. Prieto* (2003) 30 Cal.4th 226, 273.)

Second, Matthew's vulgar language, while not part of everyday discourse, is commonly used by people immersed in high-stress situations. Thus, a reasonable jury likely viewed Matthew's language as appropriate for the situation rather than inappropriate to such an extent that emotional prejudice against Matthew would result.

And third, a reasonable jury likely viewed Matthew's behavior in ejecting the journalist as an understandable response rather than incomprehensible to an emotional-

prejudice extent. This follows from our viewing of the DVD, which we did at Matthew's request. Viewing the DVD shows the following.

FEG's office appears to be in an industrial park that houses enterprises that do not do business directly with the public. The interior of FEG's office consists of private offices and the cubicle central area, which supports the idea that FEG did not do business directly with the public. Moreover, the very nature of FEG's business supports this idea. Thus, the inference is compelling that the presence of the journalist and cameraman inside FEG's premises was trespassory and unauthorized as well as obviously unwelcome. Given that SBP had received negative publicity from the same television station one year earlier, one can rationally understand Matthew's aggressive behavior in ejecting the news crew without negatively reacting toward Matthew personally.

Moreover, the trial court heavily redacted the DVD. It extensively instructed the jury on the use of the DVD. And Matthew had the opportunity to point out the evidence's weakness and argue its significance in light of that weakness. It is unlikely that the DVD shocked the emotions of the jury into using the evidence improperly. In summary, we conclude that, while the evidence may have been unduly prejudicial, the error in exposing it to the jury was harmless.

Matthew urges that the trial court's error in overruling his objection to the admission of the DVD is reversible per se under the due process clause of the federal Constitution.

We discern no due process violation from the supposed error. Recent cases make it clear that the Due Process Clause does not make review of a trial court's evidentiary rulings (under a standard similar to that of Evidence Code section 352) a component of federal constitutional law. In *Estelle v. McGuire* (1991) 502 U.S. 62, 68-70, the Supreme Court held that admission of relevant evidence does not violate the Due Process Clause, and the court in *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919, stressed that the due process inquiry is whether admission of the challenged evidence so fatally

infected the proceedings as to render them fundamentally unfair and concluded that "[o]nly if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citation.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Id*. at p. 920.)

Here, Matthew grudgingly agrees that the DVD was relevant, albeit minimally. Thus, no fundamental unfairness occurred in this case.

VIII. SUBSTANTIAL EVIDENCE--PERJURY

George as to count 9 and Tiano as to counts 9, 10, and 49 argue that there was insufficient evidence to show that they committed perjury.

When a defendant challenges the sufficiency of the evidence on appeal, the reviewing court "must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Consistent with these principles, the reviewing court gives deference to the jury's determination regarding witness credibility, since that remains within " 'the exclusive province' " of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Perjury is committed by willfully (1) giving false material testimony under oath before any competent tribunal, officer, or person, (2) making a false declaration or statement under penalty of perjury as to a material matter, or (3) making a false affidavit as to a material matter before any person authorized to administer oaths. (§§ 118, subd. (a), 118a.) The specific violation charged here was a violation of section 129. This statute provides: "Every person who, being required by law to make any return, statement, or report, under oath, willfully makes and delivers any such return, statement, or report, purporting to be under oath, knowing the same to be false in any particular, is guilty of perjury, whether such oath was in fact taken or not." (§ 129.)

George's (and Matthew's) and Tiano's count-9 convictions arose from the signing of a CF-2 form. This form is a report pertaining to the operation of commercial fundraisers that must be filed with the Attorney General for each fundraising event, must be signed under penalty of perjury by the commercial fundraiser and two representatives of the applicable charity, and must state how much money was raised, used for expenses, and distributed to the charity. FEG filed CF-2 forms from 1992 through 2000 for fundraising events on behalf of DSAL and PSAL. George and Matthew signed the forms on behalf of FEG; Tiano signed the forms on behalf of DSAL and PSAL. Each form answered "no" to a question asking whether any officer, director, partner, or owner of the fundraiser was in any way affiliated with or controlled directly or indirectly by the charitable organization for which the fundraiser had contracted to solicit. A "yes" answer would trigger an Attorney General's investigation to determine whether the relationship was appropriate.

Tiano's count-10 conviction arose from the signing of an RRF-1 form. This form is an annual registration that must be filed by charitable trusts with the Attorney General and signed under penalty of perjury. Tiano signed a 1998-1999 RRF-1 form on behalf of PSAL that answered "no" to a question asking whether nonprogram expenditures exceeded 50 percent of the revenue. The question assists the Attorney General in judging

how an organization spends its money and performs its program services. PSAL's 1998 CF-2 forms with FEG and with another affiliated fundraiser showed nonprogram expenditures at 84 and 69 percent. Its 1999 CF-2 forms showed nonprogram expenditures at 85 percent.

Tiano's count-49 conviction arose from discovery responses under penalty of perjury in his lawsuit to recover damages for the work-place injury in which he failed to disclose his (1) income from PSAL, FEG, and another entity, (2) adjudicated permanent disability from the workers' compensation case, and (3) automobile accident claim.

George urges that there was no evidence of willfulness because his answers on the CF-2 forms were equivocal given that he included attachments to the CF-2 forms stating that, contrary to his unequivocal "no" answers and declarations under penalty of perjury, the information on the forms was provided upon information and belief. There is no merit to the point.

George unequivocally answered "no." He was free to argue to the jury that his answers were equivocal because of the attachments.

George also argues that there was no evidence of materiality because "the ultimate purpose of the requirement of the filing of CF-2 forms was not revealed by the evidence." Tiano states the point this way: "there appears to have been no evidence presented at the trial as to how any of those false statements were material in the sense that a reasonable person would consider the statement important in evaluating the information in the document." There is no merit to this point.

The jury could infer from the evidence that the purpose of the CF-2 and RRF-1 forms was to assist the Attorney General in overseeing the operation of commercial fundraisers and charitable trusts and that true answers to the questions at issue would have triggered an audit, the discovery of defendants' scheme, and criminal and civil

proceedings designed to shut down the scheme. From this, the jury could reasonably find materiality.[10]

Tiano finally alludes to the language in section 119 that defines " 'oath' as used in the last two sections" (sections 118 and 118a) to include "an affirmation and every other mode authorized by law of attesting the truth of that which is stated." From this, he contends that "it is [his] position that in order to support a perjury conviction in violation of section 129 of the Penal Code, the actual false statement must be made under a true 'oath' by way of a written sworn statement under oath, and not by way of a mere unsworn declaration under penalty of perjury." We understand this point to be urging that section 119's all-inclusive definition of perjury does not apply to section 129 because section 119 references sections 118 and 118a and does not reference section 129. Thus, according to Tiano, section 129's definition of "oath" must be less than all-inclusive and does not reach a declaration under penalty of perjury. There is no merit to the point.

If, as Tiano implicitly argues above, section 118 harmonizes with section 129 for purposes of grafting a materiality element onto section 129 (*ante*, fn. 10), it certainly harmonizes with section 129 for purposes of equating its definition of "oath" with section 129's definition of the same term. (*People v. Comingore* (1977) 20 Cal.3d 142, 147 ["A statute should be interpreted with reference to the whole system of law of which it is a part"]; *Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal.3d 584, 591 ["statutes should be construed together if they harmonize and achieve a uniform and consistent legislative purpose"].) In any event, case law clearly holds that, when state law authorizes facts to be shown by affidavits or other sworn statements, valid declarations made under the penalty of perjury have the same force and effect as an affidavit

[10] We observe that section 129 does not require that statements be material. It requires only that the statements be "false in any particular." This is likely because, as our discussion illustrates, the statements that section 129 targets--statements required by law--appear to be material by definition.

administered under oath. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 610; cf. *People v. Griffini* (1998) 65 Cal.App.4th 581, 594 [by operation of Code of Civil Procedure section 2015.5 (permitting use of a declaration whenever any state law permits facts to be shown by affidavit, oath, etc.), a declaration under penalty of perjury is treated as an affidavit for purposes of section 124 (delivery requirement for purposes of perjury regarding the making of a deposition, affidavit, or certificate)].)

IX. PERJURY INSTRUCTIONS

The trial court instructed the jury on perjury, in part, as follows.

"Every person who, being required by law to make any return, statement or report under oath, willfully *makes and delivers* any such return statement or report purporting to be under oath whether such oath was, in fact, taken or not and willfully states as true a material matter knowing the same to be false is committing the crime of perjury in violation of Penal Code section 129. [¶] It is alleged [that] some of the defendants made the following false statements: [¶] (1) Annual Financial Report For Commercial Fund Raisers For Charitable Purposes or CF-2s; and [¶] (2) Annual Registration Renewal of Fee Report or RRF-1; [¶] (3) Armand Tiano's Amended Response To First Set of Judicial Council Form, Interrogatories Propounded By CF&T and Available Concrete Pumping, Incorporated and Armand Tiano's Response To First Supplemental Interrogatory. [¶] In order to prove this crime, each of the following elements must be proved: [¶] (1) A person was required by law to make any return statement or report under oath; [¶] (2) The person willfully *made or delivered* any return statement or report purported to be under oath whether such oath was, in fact, taken or not; [¶] (3) The person knew that material matters obtained in the return material report or response was false; [¶] (4) The person had the specific intent to declare a falsehood under oath. [¶] A matter is material if there is a substantial likelihood that a reasonable person would consider it important in evaluating: [¶] (1) Whether to contribute to a charitable organization or purpose; [¶] (2) Whether money is actually being used for a charitable

purpose; [¶] (3) Whether a commercial fund raiser [*sic*] is free from any bias, influence, conflict of interest, self dealing or control; [¶] (4) Whether the fund raising [*sic*] costs of a charitable program are reasonable or unreasonable; [¶] (5) Whether a commercial fund raiser [*sic*] and a charitable trustee are complying with financial record keeping obligations; [¶] (6) Whether a person had a legitimate claim for compensation under a policy of insurance, the initial right and entitlement to insurance benefits or payment compensation or the amount of a benefit or payment to which the person was entitled to or; [¶] (7) Whether a person had a colorable and legal claim for compensation or reimbursements." (Italics added.)

Later, the trial court instructed on the unanimity principle as follows.

"This instruction applies only to count 2 through 40 [*sic*][11] and the lesser uncharged tax crime of Revenue and Taxation Code section 19701. Count 1, conspiracy, has its own instructions which are similar, but different from these instructions. Use count 1 instruction for count 1. The prosecution has introduced evidence for the purpose of showing that there is more than one act or omission upon which a conviction may be based. [¶] A defendant may be found guilty if the proof shows beyond a reasonable doubt that he or she committed any one or more of the acts or omissions. However, in order to return a verdict of guilty, all the jurors must agree that he or she committed the same act or omission or acts or omissions. It is not necessary this particular act or omission agreed upon be stated in your verdict unless you are specifically instructed to do so in your verdict forms. [¶] If you find theft or fraud occurred based on a continuous

[11] We are recounting from the reporter's transcript, which apparently has a typographical error. The parties do not dispute that the trial court uttered that the instruction applied to counts 2 through 49. We also observe that the context of the instruction is consistent with such an application and the written instruction applies itself to counts 2 through 49.

course of conduct, all 12 jurors must agree as to the particular acts or omission of theft or fraud which each defendant committed."

George and Tiano first argue that the trial court's instruction on materiality was deficient because it did not state the concept that "a false statement is material if it could influence the outcome of the proceeding." (*People v. Rubio* (2004) 121 Cal.App.4th 927, 933.) We disagree.

The above concept is appropriate "in the context of perjury prosecutions based on false statements at trials and at legislative hearings." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 405 (*Hedgecock*).) But, in a perjury prosecution based on false filings by affidavit or declaration under penalty of perjury, there is no proceeding the outcome of which could be influenced by a false declaration. (*Ibid*.) In a perjury prosecution based on a false filing, "an omission or misstatement of fact is material if there is a substantial likelihood that a reasonable person would consider it important in evaluating" (*id*. at p. 406) the information disclosed against the purpose for which disclosure was required.

For example, in *Hedgecock*, the Political Reform Act of 1974 required all public officials to file annual statements of economic interests and the court held that the appropriate definition of materiality for omissions in the statements was whether there was "a substantial likelihood that a reasonable person would consider it important in evaluating (1) whether a candidate should be elected to, or retained in, public office, or (2) whether a public official can perform the duties of office free from any bias caused by concern for the financial interests of the official or the official's supporters." (*Hedgecock, supra,* 51 Cal.3d at pp. 406-407.)

Here, the trial court's instruction followed the *Hedgecock* concept by first stating the reasonable-person introductory phrase and second stating the apparent purposes of the CF-2 forms, RRF-1 form, and written interrogatory answers.

It is true that Tiano's interrogatory answers are litigation-related. However, they are not statements from "trials" or "legislative hearings." (*Hedgecock, supra,* 51 Cal.3d

at p. 405.) And they are more akin to regulatory filings than trial or legislative statements given that they are made in a pretrial setting where there is no decisionmaking tribunal to be influenced but rather an adversary who receives information for evaluation.

George and Tiano next argue that the instruction was argumentative because it listed materiality factors that echoed the People's factual theory of the case. In particular, George singles out factors 1 through 4 and Tiano singles out factors 2 through 5 as suggesting a result to the jury by focusing on evidence of fundraising activities rather than on information provided on the CF-2 forms. There is no merit to the argument.

As *Hedgecock* illustrates, the very nature of a regulatory-filing materiality instruction requires that such an instruction be somewhat fact-driven as appropriate from the purpose of the filing. Here, how money is being used, whether a commercial fundraiser is free from influence, whether costs are reasonable, and whether record keeping is accurate (factors 2-5) are factors taken or implicit from what was asked on the forms. They are unquestionably derived from the purpose of the forms, i.e., to assist the Attorney General in its oversight function. And whether to contribute to an organization (factor 1) is a factor implicit in the purpose of the forms given that the Attorney General must make the information publicly available (see Bus. & Prof. Code, §§ 17510.9, 17510.95) or could publicize information from the forms that is relevant to the public's decision to contribute to an organization.

Tiano argues that the instruction is erroneous because it states that the statement had to be made or delivered while section 129 states that the statement has to be made and delivered. He overlooks, however, that the instruction introduces itself with the correct statutory language and, only when it repeats the concept, uses "or" instead of "and." Thus, the instruction is ambiguous rather than incorrect.

In determining the correctness of jury instructions, we consider the instructions as a whole. (*People v. Burgener* (1986) 41 Cal.3d 505, 538, overruled on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 746.) "If a jury instruction is ambiguous, we

inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Smithey* (1999) 20 Cal.4th 936, 963.)

Here, there is no reasonable likelihood that the jury misunderstood and misapplied the instruction. This follows because the forms and interrogatory answers were signed and found their way to the required destinations. Either George or Tiano made and delivered the statements or he did not. It is not reasonably likely that a juror could have concluded that George or Tiano made but did not deliver or delivered but did not make the statements.

Tiano also argues that "when it came to the element of 'materiality,' all the trial court said was that the accused knew that material matters in the return, statement or report were false; the trial court did not state that, in fact, the return, statement or report actually had to contain materials [*sic*] matters that were false." We do not comprehend this point, and Tiano does not explain it further. If the trial court told the jury that the accused must know that material matters in the statement were false, then it necessarily told the jury that the statement had to contain material matters that were false.

George and Tiano finally argue that the unanimity instruction was deficient because it did not refer to perjury in its concluding paragraph ("If you find theft or fraud occurred based on a continuous course of conduct, all 12 jurors must agree as to the particular acts or omission of theft or fraud which each defendant committed"). But, again, the instruction is ambiguous at most. The trial court expressly stated at the outset that the unanimity instruction applied to counts 2 through 49 and that count 1 had its own, different instructions. There is no reasonable likelihood that a juror could conclude that this specific language was trumped by an omission that effectively created an implied exception to the language. To so conclude, one would have to read the instruction as applying to counts 2 through 49 while adding the unwritten words, "except counts 9, 10, and 49."

X. INTENT-TO-DEFRAUD INSTRUCTIONS

Tiano contends that the trial court erred by instructing the jury with argumentative instructions on the concept of intent to defraud that improperly pointed to specific evidence favorable to the prosecution. We disagree.

" 'The trial court functions . . . as the jury's guide to the law. This role requires that the court fully instruct the jury on the law applicable to each particular case. " 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' " ' " (*People v. Daya* (1994) 29 Cal.App.4th 697, 712.) " ' "[T]he language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction." ' " (*People v. Smithey*, *supra*, 20 Cal.4th at p. 980.)

A so-called "pinpoint" instruction, which relates particular facts to a legal issue in the case or an evidentiary theory of a party, is an acceptable means of providing explanatory information to the jury. (*People v. Flores* (2007) 157 Cal.App.4th 216, 220.) An instruction that pinpoints specific evidence rather than a legal issue or theory, however, is impermissible. Such an instruction is deemed argumentative because it directs the jury to specific evidence and invites inferences on a disputed question of fact favorable to one party. (*Ibid.*)

Here, the trial court instructed the jury on the intent to defraud in the language of CALJIC No. 15.26 as follows: "An intent to defraud is an intent to deceive another person for the purpose of gaining some material advantage over that person or to induce that person to part with property or to alter that person's position to his or her or its injury or risk and to accomplish that purpose by some false statements, false representation of facts, wrongful concealment or suppression of the truth or by any other artifice or act designed to deceive."

Elsewhere, it explained to the jury as follows: "You will hear and see jury instructions that are from the Business and Professions Code and the Government Code and the Civil Code. The defendants are not charged with any crimes in the Business and Professions Code, Government Code and Civil Code. These Business and Profession Codes and Government Codes and Civil Code sections relate to underlying statutory civil obligations which the People can argue the defendant did not meet. [¶] Violation of these codes is not a criminal offense nor is the failure of defendants to follow these codes an element of any trial charges. However, violations and/or failures within the Business and Professions Code and Government Code and Civil Code may be used by you as circumstantial evidence of an intent to defraud. There still remains a specific intent requirement as found in the instructions relating to the charged crimes." It then defined "solicitation" or "soliciting" for charitable purposes as defined in the Business and Professions Code and Government Code, "sales solicitation for charitable purposes" as defined in the Business and Professions Code, and "charity" as defined in the Business and Professions Code. It continued by instructing in the language of specific code sections as follows.

"Prior to any solicitation or sales solicitation for charitable purposes, the solicitor or seller shall provide in written form the following information: [¶] (1) The name and address of the organization or campaign on behalf of which all or a part of the donation will be used for charitable purposes; [¶] (2) If there is no organization the manner in which the donation will be used for charitable purposes; [¶] (3) The non-tax exempt status of the organization if the organization does not have a charitable tax exemption under both state and federal law; [¶] (4) If the solicitation is made on behalf of any non-governmental organization by any name which includes but is not limited to the term 'officer,' 'peace officer,' 'police,' 'law enforcement,' 'reserve officer,' 'deputy,' 'California Highway Patrol' or 'deputy sheriff' which would reasonably be understood to imply that the organization is composed of law enforcement personnel. [¶] The solicitor

shall give the total number of members in the organization and number of members working or living in the county where the solicitation is being made and if the solicitation is for advertising the statewide circulation of the publication in which the solicited advertisement will appear." (See Bus. & Prof. Code, § 17510.3.)

"If the initial solicitation or sales solicitation is made by any means not involving direct personal contact with the person solicited, the solicitation shall clearly disclose the information set forth in the previous instruction: [(1)-(4)] This requirement does not apply to radio and television solicitation of 60 seconds or less. [¶] If a donation or sale is consummated, written material complying with the information required under one through four as stated in this instruction shall be mailed or otherwise delivered to the donor or buyer." (See Bus. & Prof. Code, § 17510.4.)

"A commercial fund raiser [*sic*] for charitable purposes who solicits funds or other property in this state for charitable purposes shall disclose prior to an oral solicitation or sales solicitation made by direct personal cont[]act, telephone or at the same time as a written solicitation or sales solicitation; (a) that the solicitation is being conducted by a commercial fund raiser [*sic*] for charitable purposes; and (b) the name of the commercial fund raiser [*sic*] as registered with the Attorney General." (See Bus. & Prof. Code, § 17510.85.)

According to Tiano, the provisions of Business and Professions Code sections 17510.3, 17510.4, and 17510.85 were "part of the facts of the case" and, thus, the " 'items of evidence' were the 'violations and/or failures with the Business and Professions Code and Government Code and Civil Code,' and the disputed question of fact that the jury was 'invited' to infer from such items of evidence, which clearly and undisputably favored respondent, was the 'intent to defraud.' " Tiano's interpretation of the instructions is erroneous.

The Business and Professions Code instructions merely parroted the language of statutes that defined obligations central to the People's theory, namely that the defendants

breached statutory obligations. (*People v. Smithey*, *supra*, 20 Cal.4th at pp. 980-981.) Without an instruction that those statutory obligations existed, the People could ill argue that defendant breached statutory obligations. As such, the instructions are pinpoint instructions, highlighting a legal issue to which facts could be related. (*People v. Flores*, *supra*, 157 Cal.App.4th at p. 220.) They do not pinpoint specific evidence rather than a legal issue or theory. It is true that the trial court's explanatory instruction told the jury that it could consider violations of the obligations as circumstantial evidence of intent to defraud. But that instruction again simply pinpointed the second prong in the People's theory, namely that the defendants intended to defraud because they breached statutory obligations. It did not direct the jury to specific evidence or invite the inference desired by the People. It specifically conveyed the concept that the People "can argue the defendants did not meet" the statutory obligations, which, in turn, necessarily conveys that there was a dispute for the jury to resolve. It did not require the jury to find statutory violations. It merely informed the jury that it could consider whether there were statutory violations and whether any violations it might find evinced intent to defraud.

In short, the trial court informed the jury of the types of things it could consider, but not how to consider them or how to apply the evidence to reach a result. The instructions did not suggest in any manner that the People's interpretation of the evidence was correct. They were not fact-based, argumentative instructions as Tiano asserts.

XI. TAX-EVASION INSTRUCTIONS

The jury convicted defendants of violating Revenue and Taxation Code section 19706, which provides in relevant part: "Any person . . . who, within the time required by or under the provisions of this part, willfully fails to file any return or to supply any information with intent to evade any tax imposed by [the income tax laws], or who, willfully and with like intent, makes, renders, signs, or verifies any false or fraudulent return or statement or supplies any false or fraudulent information, is punishable . . . ."

Matthew and Tiano's convictions of counts 12 through 15 were for failing to file corporate tax returns for DSAL and PSAL. Tiano's convictions of counts 17 through 20 were for failing to report personal income (false tax return). Matthew's convictions of counts 26 through 30 were for failing to report personal income (false tax return). Matthew and George's convictions of counts 31 through 35 were for failing to file corporate tax returns for FEG.

George and Tiano contend that their convictions for tax evasion must be reversed because the trial court failed to instruct the jury that a tax deficiency was an element of the offense. We disagree.

The trial court instructed the jury in the language of CALJIC No. 7.66 as follows: "Any person or any officer or employee of any corporation who within the time required by or of the provisions and charged with the income tax law willfully fails to file any tax return or to supply any information with intent to evade any tax imposed by the personal income tax law or corporation tax law is guilty of a violation of Revenue and Taxation Code section 19706, a crime. [¶] In order to prove this crime, each of the following elements must be proved: [¶] (1) A person was required to file a tax return with or supply information to the Franchise Tax Board; [¶] (2) That person failed to file the tax return and supply the information within the time required by the Franchise Tax Board; [¶] (3) This failure to file the tax return or supply the information within the required time was done with the specific intent to evade tax; and [¶] (4) That person acted voluntarily in intentional violation of a legal duty known by the defendant."

The trial court also instructed in the language of CALJIC No. 7.67 as follows: "Any person or any officer or employee of any corporation who willfully and with the intent to evade any tax imposed by the personal income tax law or corporation tax law makes, renders, signs or verifies any false or fraudulent tax return or statement or supplies any false statement or fraudulent information is guilty of a violation of Revenue and Taxation Code section 19706, a crime. [¶] In order to prove this crime, each of the

following elements must be proved: [¶] (1) A person or any officer or employee of any corporation willfully made, rendered, signed or verified the false or fraudulent tax return or statement or willfully supplied false or fraudulent information on the tax return or statement, personal income tax law or corporation tax law; and [¶] (3) (Sic) That person or officer or employee acted voluntarily in and intentional violation of a known legal duty."

Neither Revenue and Taxation Code section 19706 nor CALJIC Nos. 7.66 or 7.67 specifically mentions a tax deficiency.[12] In *Mojica, supra*, 139 Cal.App.4th 1197, the court held that a tax deficiency is an element of a violation of Revenue and Taxation Code section 19706, and that the jury must be so instructed. (*Mojica, supra*, at pp. 1205, 1208.) It determined that the California statute was substantially identical to the federal tax evasion statute (26 U.S.C. § 7201), and noted that "the federal statute has long been interpreted to require proof that the alleged tax evader actually owed some taxes." (*Mojica, supra*, at pp. 1202, 1204-1205, citing *Lawn v. United States* (1958) 355 U.S. 339, 361, and *United States v. Dack* (7th Cir. 1984) 747 F.2d 1172, 1174.) The federal statute, like the California statute, requires an intent to evade a "tax imposed by this title." (26 U.S.C. § 7201; see Rev. & Tax. Code, § 19706.) That language requires establishing a tax deficiency. (*Mojica, supra*, at pp. 1202-1203, citing *United States v. Silkman* (8th Cir. 1998) 156 F.3d 833, 835.)

[12] The trial court instructed the jury with the CALJIC pattern instructions that were in effect at the time of trial. Since then, "the CALJIC pattern instructions have been superseded by the new California Criminal Jury Instructions (CALCRIM). CALCRIM No. 2801 does require proof of a tax deficiency, stating that '[The People do not have to prove the exact amount of (unreported income/[or] [additional] tax owed). The People must prove beyond a reasonable doubt that the defendant (failed to report a substantial amount of income/[or] owed a substantial amount in [additional] taxes).].' " (*People v. Mojica* (2006) 139 Cal.App.4th 1197, 1204, fn. 4.)

The People urge that the trial court did instruct that a tax deficiency was required to convict because it instructed in the language of CALJIC No. 7.76 as follows: "In a prosecution for preparing a false return, it is not necessary for the People to prove the exact amount of unreported income by the defendant. It is enough if the prosecution shows that a substantial amount of income was not reported." But an instruction stating that the prosecution need only show that a substantial amount of income was not reported does not convey the same concept as an instruction stating that the prosecution must show a tax deficiency.

"The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.] That obligation includes instructions on all of the elements of a charged offense." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) The failure to instruct on an element of a crime is reviewed under the constitutional standard of harmless error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (See *Neder v. United States* (1999) 527 U.S. 1, 8-15 (*Neder*); *People v. Sakarias* (2000) 22 Cal.4th 596, 624-625.) Under the *Chapman* standard, it must appear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra,* at p. 24.) In the context of an omitted element, "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (*Neder, supra,* at p. 17; see also *id*. at pp. 19-20 [tax returns significantly understating income necessarily established materiality of false statements, making failure to instruct jury on element of materiality harmless].)

We agree that the error in this case was harmless beyond a reasonable doubt.

Under federal law, evidence of unreported taxable income is sufficient to prove a tax deficiency. (*United States v. Beall* (7th Cir. 1992) 970 F.2d 343, 346.) The prosecution need not show any particular amount of tax owed; once it is established the

defendant had unreported taxable income in some amount, the burden shifts to the defendant to show his deductions would eliminate any tax liability. (See *Mojica, supra,* 139 Cal.App.4th at pp. 1203, 1208; *United States v. Silkman, supra,* 156 F.3d at pp. 836-837; *United States v. Beall, supra,* at p. 346; *United States v. Bender* (9th Cir. 1979) 606 F.2d 897, 898.)

Here, the People not only proved unreported taxable income, they proved a tax deficiency. Their expert estimated that DSAL and PSAL owed income taxes for the years 1996 through 2000 of $275,000. He estimated that Tiano owed income taxes for the years 1996 through 1999 of $20,000 on unreported income of $377,000. He estimated that Matthew owed income taxes for the years 1996 through 2000 of $83,000 on unreported income of $886,000. And he estimated that FEG owed income taxes for the years 1993 through 1999 of $40,000 on unreported income of $432,000, noting that, in some years, FEG owed only the minimum corporate tax of $800.

Since it was shown that taxable income was received and tax was owed, the People met their burden to prove a tax deficiency. To refute this showing, it was defendants' burden to come forward with evidence of exemptions and deductions negating any tax. (See *Mojica, supra,* 139 Cal.App.4th at pp. 1203, 1208; *United States v. Silkman, supra,* 156 F.3d at pp. 836-837; *United States v. Beall, supra,* 970 F.2d at p. 346; *United States v. Bender, supra,* 606 F.2d at p. 898.) "Once the Government has established its case, the defendant remains quiet at his peril." (*Holland v. United States* (1954) 348 U.S. 121, 138-139.) "[I]t is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." (*Rossi v. United States* (1933) 289 U.S. 89, 91-92.)

Defendants rely on the court's conclusion in *Mojica* that the instructional error was not harmless even with strong evidence of taxable income, because "if [defendant]

had known ahead of time about the tax deficiency requirement and its concomitant defense, he might well have put on a stronger case concerning proof of his claimed deductions and expenses." (*Mojica*, *supra*, 139 Cal.App.4th at p. 1208.) They urge that, like the defendant in *Mojica*, they might have presented a stronger case, with proof of claimed deductions and expenses, had the jury been instructed that it was required to find a tax deficiency.

We disagree with this analysis. Defendants' burden to come forward with evidence of exemptions and deductions negating any tax was triggered when the People carried their burden to show unreported taxable income and, in this case, actual tax deficiency. It was not, and conceptually cannot be, dependent upon the correctness of the trial court's jury instructions given after the close of the evidentiary phase of trial. Moreover, in stating that "Once a tax deficiency is established, the defendant can then try to show that he owed no taxes at all by way of unclaimed deductions" (*Mojica*, *supra*, 139 Cal.App.4th at p. 1208), *Mojica* overlooks that a defendant's burden can also be triggered after the People establish unreported taxable income. In any event, *Mojica*'s analysis on this point was influenced by its conclusion that the defendant in the case was misled into believing that a tax deficiency was not "at play during the trial" because he had requested and the trial court had refused an instruction "that the prosecution had to prove the existence of a tax deficiency." (*Id.* at p. 1208, fn. 14.)

The trial court's failure to instruct that a tax deficiency must be found was harmless beyond a reasonable doubt.

XII. WILLFULLY COMMITTING TAX EVASION

The trial court instructed the jury as follows: "Willfulness to evade tax may be inferred from conduct such as keeping a double set of books, making false entries or alterations or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the

records usual and transactions of the kind and any conduct the likely effect of which would be to mislead or to conceal."

George and Tiano contend that the instruction was argumentative because it directed the jury to examine certain specific items of evidence and implied the effect to be given that evidence.

This interpretation of the instructions is erroneous. The instruction simply pinpoints a legal theory of the case, namely willfulness, to which facts could be related. It set forth examples of the general types of evidence that a jury might look to without directing the jury to specific evidence or inviting an inference. As in the perjury instructions, the trial court simply informed the jury of the types of things it could consider, but not how to consider them or apply the evidence.

XIII. UIC INSTRUCTIONS

Concerning the telemarketing staff employed by FEG, DSAL, and PSAL, the jury convicted Matthew and Tiano in counts 36 through 38 of willfully failing to file employee payroll tax returns (Unemp. Ins. Code, § 2117.5), willfully failing to collect or pay employee payroll taxes (*id*., § 2118.5), and willfully failing to pay unemployment insurance (*id*., § 2108). Audits showed that the California Employment Development Department had assessed $39,000 in unpaid taxes against Matthew and $949,000 in unpaid taxes against DSAL and PSAL.

As to the failing-to-file count, the trial court instructed the jury as follows. "Any person who, within the time required by the [UIC], willfully fails to file any return or report or to supply any information with intent to evade any tax imposed by the [UIC] or who willfully and with like intent makes, render, signs or verifies any false or fraudulent return, report or statement or supplies any false or fraudulent information is violating [UIC] section 211.75 [*sic*], a crime. [¶] In order to prove this crime, each of the following elements must be proved: [¶] (1) A person was required by the [UIC] to file any return or report or to supply any information; [¶] (2) That person failed to file any

return or supply any information; and [¶] (3) That person acted with specific intent to evade any tax imposed by the [UIC]; or, [¶] (1) A person was required by the [UIC] to file any return or report or to supply information; [¶] (2) That person willfully makes, renders, signs or verifies any false or fraudulent return, report or statement or supplies any false or fraudulent information; and [¶] (3) That person acted with specific intent to evade any tax imposed by the [UIC]."

Tiano contends that the instruction is deficient because it failed to define the element, "willfully," as requiring the defendant to act "in voluntary, intentional violation of a known legal duty." (*People v. Hagen* (1998) 19 Cal.4th 652, 666.) We disagree.

The instruction conveys the concept. It advises that a defendant must have acted "with specific intent to evade any tax." This language is indistinguishable from the *Hagen* language, which advises that a defendant must have intentionally violated a known legal duty. In fact, the given language is more case-specific because it advises about evading a tax rather than violating a generic legal duty. In any event, the trial court gave the *Hagen* language immediately afterward when instructing on the failing-to-pay counts. As to each, the trial court advised: "(3) That person acted voluntarily in an intentional violation of a known legal duty." An erroneous failure to instruct can be cured if it is shown that the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. (*People v. Stewart* (1976) 16 Cal.3d 133, 141.)

Tiano counters that the question was not necessarily resolved adversely because the failing-to-pay counts were different counts that occurred at different times from the failing-to-file count. We disagree. All three counts arose from the same audit that showed income, a failure to report that income, and a failure to pay taxes on that income. The jury could not rationally have found Tiano guilty of one of the counts and not the others. Thus, the jury would have necessarily considered the instructions together and

referred to the failing-to-pay counts if it had any question about the meaning of "willfully" in the failing-to-file count.

Tiano also argues that the instructions on all three counts were deficient because they did not include a tax deficiency element. He relies on *Mojica* and advances the same argument that we have rejected previously. But, here, we disagree that the instructions did not convey the tax-deficiency element. As to the failing-to-pay-payroll-taxes count, the trial court told the jury that one of the elements to be proved was that "A person was required under the [UIC] to collect, account for and pay over a tax or an amount required to be withheld." As to the failing-to-pay-unemployment-insurance count, the trial court told the jury that one of the elements to be proved was that "A person was required under the [UIC] to make contributions." Each of these instructions convey the concept that taxes must be owed (a tax deficiency) before a conviction can be had. And to the extent that the failing-to-file count has a tax-deficiency element and the given language ("A person was required . . . to file any return") fails to convey a tax-deficiency concept, the instruction was harmless beyond a reasonable doubt given that the jury necessarily found a tax deficiency by convicting Tiano of failing to pay.

XIV. EMPLOYEE\INDEPENDENT CONTRACTOR

The trial court instructed the jury as follows.

"During this trial there were issues relating to employee versus independent contractor. While both may work for another person or company there is a distinction between an independent contractor and an employee. An independent contractor is one who in rendering services exercises independent employment or occupation and represents her employer only as to the results of his or her work and not as to the means whereby it is to be accomplished. [¶] In deciding whether a person was an employee or an organization, you must first decide whether the organization had the right to control how a person performed the work rather than just the right to specify the result. It does not matter whether the organization exercised the right to control. If you decide that the

right to control existed, then a person was the employee of the organization. If you decide that an organization did not have the right of control, then you must consider all the circumstances in deciding whether a person was an employee of the organization. [¶] The following factors, if true, may show that a person was the employee of the organization: [¶] (A) The organization supplied the equipment, tool and place of work; [¶] (B) The person was paid by the hour time rather than being paid by the job; [¶] (C) The work being done by the person was part of the regular business of the organization; [¶] (D) The organization had an unlimited right to end the relationship with the person; [¶] (E) The work being done by the person was the only occupation or business of the person; [¶] (F) Whether or not the one performing services is engaged in a distinct occupation for business; and [¶] (G) The kind of work performed by the person is usually done under the direction of a supervisor rather than by a specialist working without supervision; [¶] (H) The kind of work performed by the person does not require specialized or professional skills; [¶] (I) The services performed by the person were to be performed over a long period of time; and [¶] (J) The organization and the person acted as if or believed they had an employer/employee relationship. Pursuant to the [UIC] an officer of a corporation is an employee."

Tiano contends that the instruction is improper as argumentative because it gave the jury items of evidence that invited the jury to infer an employer-employee relationship.[13] We disagree for reasons we have explained in addressing Tiano's similar, previous arguments. The trial court simply informed the jury of the types of things it could consider, but not how to consider them or apply the evidence. It specifically cautioned in the beginning that the jury could consider the factors "if true." (See, e.g.,

[13] In the context of counts 36 through 38, Tiano again objects on argumentative grounds to the willfulness instruction on the same basis that he advanced in the context of the income tax evasion counts.

Giacomini v. Pacific Lumber Co. (1907) 5 Cal.App. 218, 226-227 ["It probably was unnecessary for the court to detail the evidence which was to be considered, as the general direction in reference to all the evidence was ample; but the instruction is correct in its definition of the relations involved; it does not purport to pass upon the weight or effect of the evidence, and it is not apparent how it could have prejudiced the defendant. As it was proper for the jury to determine whether Thompson and Maddux were independent contractors or were servants of the defendant, the action of the court in calling attention specifically to the evidence which must be the basis of the finding cannot be successfully assailed."].)

XV. MOTION FOR A NEW TRIAL

After Tiano filed a motion for a new trial, George, via attorney Allen Schwartz, filed a motion to join in Tiano's motion. He appeared at a hearing and argued his motion and participated in arguing the merits of points that Tiano had raised. The trial court thereafter granted George's motion to join and took the new-trial motion under submission. But, over the next two months, it entertained numerous further hearings on the new-trial motion at which George participated and for which George filed papers. It ultimately denied the new-trial motion. At sentencing, the following colloquy occurred.

"THE COURT: . . . Mr. Schwartz, did you want to present anything at this time?

"MR. SCHWARTZ: Yes, your Honor. Thank you very much. [¶] Before I get into the matter of sentencing I'd like to bring a new trial motion on behalf of George Kellner. The new trial motion that was originally heard by this court was joined by Mr. Kellner with leave of court. I came into this case as the court knows, of course, after Mr. Coker was permitted to leave after closing argument and close of evidence but before verdicts were to proceed.

"THE COURT: May I ask, do you have a written motion for new trial?

"MR. SCHWARTZ: I do not.

"THE COURT: I will accept a written motion for new trial if you are going to argue it orally at this time I will find it untimely.

"MR. SCHWARTZ: Very well. Let me move on to the next point."

Relying on *People v. Braxton* (2004) 34 Cal.4th 798, 817, George contends that the trial court erroneously denied his second motion for a new trial "because a motion for new trial may properly be made orally, and such a motion is timely if made before judgment is pronounced." George's analysis is erroneous.

A defendant has a right, prior to entry of judgment, to move for a new trial on one or more of various statutory grounds. (§§ 1181, 1191.) If a trial court refuses or neglects to hear and determine such a motion, the defendant is entitled to a new trial if he or she suffers prejudice as a result. (*People v. Braxton*, *supra*, 34 Cal.4th at p. 817; § 1202.)

Here, the trial court did not refuse or neglect to hear and determine a motion for a new trial. It heard and ruled on George's new trial motion and refused to entertain another motion because the second motion was not in writing.

To the extent that George urges that the trial court failed to give him a continuance to put his second motion in writing, the point fails. A trial court has discretion to deny a motion for a continuance and its ruling will be disturbed on appeal only if there has been a manifest abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) Here, George makes no contention that the trial court's ruling was irrational. Nor could he. It is simply not irrational to deny a second motion for a new trial made orally and belatedly at sentencing on unarticulated grounds after the first motion was argued for over two months. (See *People v. Rose* (1996) 46 Cal.App.4th 257, 264 ["A second new trial motion should fail, despite the trial court having jurisdiction, where the grounds in the second motion are untimely raised."].) In any event, "a trial court that has *denied* a

motion for a new trial lacks authority to consider and grant a second or renewed motion for a new trial." (*People v. DeLouize* (2004) 32 Cal.4th 1223, 1228.)[14]

XVI. SECTION 654

Section 654 provides, in relevant part: "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The purpose of the statute is "to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense--the one carrying the highest punishment." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) The section's protection extends to cases in which a defendant engages in a course of conduct that violates different offenses and comprises an indivisible course of conduct punishable under separate statutes. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) As this court explained in *People v. Braz* (1997) 57 Cal.App.4th 1, 10, multiple punishment is permissible notwithstanding section 654 if the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each

[14] Decisions have recognized certain exceptions to this general rule not applicable here. "An order on a motion for new trial may be reconsidered (1) where the ruling is immediately reconsidered before it has been fixed by entry in the minutes and before any further proceedings have transpired [citation]; (2) in a furcated trial, where certain policy considerations render the general rule inapplicable [citation]; or (3) where the order is entered inadvertently or prematurely [citation]. A fourth 'exception,' the vitality of which remains untested, was recently created to permit a new trial motion to be renewed where the original motion by defendant was denied and the second motion urges defendant had received ineffective assistance of counsel in connection with the first motion." (*People v. Snyder* (1990) 218 Cal.App.3d 480, 489, fn. 5, disapproved on another ground in *People v. DeLouize*, *supra*, 32 Cal.4th at p. 1233, fn. 4.)

other. [Citation.] A defendant's criminal objective is 'determined from all the circumstances and is primarily a question of fact for the trial court, whose findings will be upheld on appeal if there is any substantial evidence to support it.' " We must view the evidence in a light most favorable to the respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.) The proper procedure for disposing of a term banned by section 654 is to impose and stay the sentence. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 420.)

As to Tiano for counts 1 through 38, the trial court sentenced Tiano to nine years for embezzlement by a trustee (count 3), one year consecutive for perjury (count 9), and seven consecutive eight-month terms for failing to file corporate tax returns (counts 14-15), failing to report personal income (counts 19-20), and violating the UIC (counts 36-38). It stayed the sentences as to counts 1 through 2 and counts 4 through 8. And it imposed concurrent terms for perjury (count 10), money laundering (count 11), failing to file corporate tax returns (counts 12-13), and failing to report personal income (counts 17-18).

Tiano contends that all of the sentences except the one for count 3 should be stayed pursuant to section 654. He urges that "the whole theory of the prosecution's case against [him], in counts 1 through 38, was one grand scheme of embezzlement of funds raised by [a] fraudulent telemarketing operation. Not only was the money embezzled for the personal use of [him] and other, but [he] participated in hiding and concealing the embezzlement by [committing the other offenses]. By doing any one of those requirements or obligations truthfully and correctly, the scheme would have, or could have, been exposed. Under such circumstances, there was only one indivisible course of conduct by [him] incident to one objective (i.e., embezzle the money without detection)."

Tiano's argument undercuts his contention.

Multiple punishment is not barred by section 654 when a second offense is committed in order to avoid detection of the first crime. In *People v. Nichols* (1994) 29 Cal.App.4th 1651, the court found "substantial evidence that appellant had two separate objectives: (1) to hijack the truck by kidnapping and robbing the victim and (2) to avoid detection and conviction by dissuading and intimidating the victim." (*Id.* at p. 1657.) The court explained that "[t]he first objective was accomplished in two hours. The second was ongoing. It was initially successful when the victim, fearing for his life, falsely told the police he had been blindfolded and could not identify any of the kidnappers. [¶] The means of achieving each objective was also different. A shotgun pressed against the victim's stomach achieved the first. Looking at the victim's driver's license, reading aloud his address, and threatening future harm achieved the second." (*Id.* at p. 1658.)

Thus, if, as Tiano concedes, he embezzled for his personal use and then participated in hiding and concealing the embezzlement by committing the other offenses, then the trial court was entitled to conclude that Tiano had two separate objectives: (1) to embezzle the money, and (2) to avoid detection and conviction.

Moreover, to say that Tiano's overall intent was to put ill-gotten gains into his own pocket proves too much. Virtually every illegal step in a fraudulent scheme is customarily designed to enrich the perpetrator, but that fact alone does not trigger application of section 654. As one court has observed, "an assertion of a desire for wealth as the sole intent and objective in committing a series of separate thefts . . . to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 552.) Tiano's claimed single objective of embezzling money is the kind of "broad," "amorphous," and "overriding" intent that should not be used to "reward the defendant who has the greater criminal ambition with a lesser punishment." (*Ibid.*)

In addition, Tiano's financial shenanigans were numerous and took place over a period of years. It is "clear that a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.) "This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) For example, in *Gaio*, the defendant accepted three bribes from one person whose purpose was to obtain official influence in favor of his business. Because the bribes were taken months apart, the court held that, even assuming identical objectives, each was separately punishable. (*Ibid.*)

An example of a course of conduct pursued with the single objective of accessing fraudulently obtained funds by means of separate offenses, divisible in time, appears in *People v. Andra* (2007) 156 Cal.App.4th 638. There, the defendant used a stolen identity to open bank accounts into which she deposited stolen and forged checks, withdrawing the funds over a period of several weeks. (*Id.* at p. 642.) The court held that the defendant was properly punished for both identity theft and obtaining money by false pretenses, because "the temporal separation between these crimes, [gave her] substantial opportunity to 'reflect' on her conduct and then 'renew' her intent to commit yet another crime. [Citation.] She chose, repeatedly, to continue on in her crime spree." (*Ibid.*) Similarly, the multi-year period during which Tiano continued his crime spree gave him ample time to reflect on his conduct while engaging in the separate offenses.

In short, Tiano's overriding objective to embezzle money is not a bar to multiple punishment. Tiano was free to argue that the whole theory of the prosecution's case against him was one grand scheme of embezzlement and his objectives--to embezzle and to avoid detection--were indistinct. But the argument simply poses an interpretation of the facts for the trial court's resolution. We add that the trial court explicitly rejected

Tiano's interpretation of the facts. In justifying its imposition of consecutive sentences, the trial court announced the following: "As to those charges that will run consecutive, the Court is imposing a consecutive sentence for the following reason: (1), each crime and objective are independent of each other; (2), they involve separate acts; and (3), they were committed at different times and/or at separate places."

Matthew and George join Tiano's claim of error by adopting Tiano's argument without making unique arguments. Their claims therefore fail for the same reason as Tiano's claim fails.[15]

XVII. DISPOSITION

The judgments are affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Duffy, J.

[15] George informs us that he wishes to request a hearing in the trial court for purposes of challenging the amount of restitution he was ordered to pay for the cost of investigation in the case. He then asks that we order the hearing assigned to a different judge because of the judicial misconduct in this case, which includes, according to George, the trial court's refusal to hear his motion for a new trial. Since we have rejected the judicial-misconduct and new-trial-motion claims of error, we decline George's request.